DOCUMENT RESUME

ED 236 254 UD 023 032

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TITLE	"There Is No Liberty..." A Report on Congressional Efforts to Curb the Federal Courts and to Undermine the Brown Decision.
INSTITUTION	Citizens Commission on Civil Rights, Washington, DC.
PUB DATE	Oct 82
NOTE	144p.
PUB TYPE	Viewpoints (120) -- Reports - General (140)
EDRS PRICE	MF01/PC06 Plus Postage.
DESCRIPTORS	*Busing; *Civil Liberties; *Civil Rights; Constitutional Law; Court Litigation; *Court Role; Desegregation Plans; *Discriminatory Legislation; Federal Courts; *Federal Legislation; Government Role; Legislators; Racial Relations; School Desegregation; School Resegregation; School Segregation
IDENTIFIERS	*Proposed Legislation

ABSTRACT

In an effort to foster better understanding of the crucial role of the courts in protecting all persons from legislative and executive overreaching, this report examines and evaluates the Helms-Johnston Amendment, one of many efforts Congress is making to limit the authority of federal courts in cases involving the controversial issues of desegregation, abortion rights, and school prayer. The Johnston portion of this Amendment would impose limits on court-ordered busing to a student's nearest school or to a school within 5 miles of his or her home. The Helms portion would prohibit the Justice Department from bringing or maintaining any action directly or indirectly to require busing beyond the proposed limits of this bill, and would charge the Justice Department to enforce the new bill, even to the extent of reopening previously decided cases. The report attacks the Amendment on the following grounds: (1) it is unconstitutional; (2) it limits the role of the courts in protecting citizens' rights; (3) in addition to mandating continuation of unconstitutionally segregated schools, the Amendment bars the implementation of desegregation programs that have been effective in improving educational opportunity; and (4) enactment of the Amendment would seriously impair racial harmony in the United States by recreating racially dual school systems and promoting the perception that the government is repudiating its commitment to racial justice. (CMG)

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"there is no liberty, if the
power of judging be not separated
from the legislative and executive
powers." Montesquieu, Spirit of
Laws I, p. 181.

The Commission is indebted to Nikki Heidepriem for her work in writing this report. Ms. Heidepriem is a lawyer in Washington, D.C.

Research and editorial assistance were provided by Ms. Heidepriem's colleague, Elliot Gerson, and by Maureen Kelleher and Beverly Jennison, law student interns at the Center for National Policy Review, Catholic University Law School.

This report was prepared under the overall supervision of William L. Taylor, Director of the Center, who also serves as director of the Commission. David Tatel of the law firm Hogan & Hartson gave helpful advice on the report.

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Introduction 1

Members of the 97th Congress have introduced more than a score of bills designed to limit the authority of federal courts in cases involving the controversial issues of desegregation, abortion rights and school prayer. The common purpose of these bills is to modify prevailing interpretations of the Constitution by the United States Supreme Court to reflect what the sponsors believe to be popular political sentiment.

The notion that courts should be guided in constitutional determinations by public sentiment, and curbed by legislation if their decisions conflict with popular will, is of most serious concern to the Commission. Legislation premised on this critical misunderstanding of the role of courts would radically reallocate authority in our system of checks and balances, and would eliminate vital protections against government abuse of the rights of citizens.

The measure on which this report focuses is the Helms-Johnston Amendment, intended to restrict the authority of courts to protect constitutional rights in school desegregation cases. The Helms-Johnston Amendment has passed the Senate and garnered the support of the Attorney General of the United States. The Johnston portion of the Amendment would impose limits on court-ordered busing to a student's nearest school or to schools within 15 minutes or five miles of his

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or her home. The courts could not order, directly or indirectly, busing beyond that provided for in the bill, and the Justice Department is charged to enforce the bill on the complaint of a parent or student, even to the point of reopening previously decided cases.

The Helms portion prohibits the Justice Department from bringing or maintaining any action to require, directly or indirectly, the busing of a student to a school other than the one nearest his or her home.

In completely prohibiting the federal courts from issuing remedies that the Supreme Court has held are often necessary to protect constitutional rights, the Helms-Johnston Amendment violates the fifth amendment and other provisions of the Constitution designed to assure that constitutional rights are determined by the courts and changed only through the process of constitutional amendment. In predicating restraints on busing remedies on a denial of the clear evidence that busing is an effective and educationally beneficial remedy, the Helms-Johnston Amendment threatens to close the doors to equal educational opportunity. And, in calling for the unraveling of many plans that have been implemented to comply with Brown v. Board of Education, the Helms-Johnston Amendment threatens to reopen racial conflict in communities where the matter of public school integration has been long and successfully resolved.

I. The legal deficiencies of the Helms-Johnston Amendment 5

The Helms-Johnston Amendment relies explicitly on

Congress' power under article III, section 1, of the Constitution, and under section 5 of the fourteenth amendment. For the reasons summarized below, this report concludes that the Helms-Johnston Amendment is unconstitutional.

A. The Johnston Amendment violates the Constitution by selectively divesting the federal courts of authority to redress constitutional wrongs and by transferring from the Supreme Court to the Congress final power to interpret the Constitution. 9

1. Johnston bars judicial remedies that are indispensable to protect fourteenth amendment rights. 9

While the Johnston Amendment would not remove federal court jurisdiction over school desegregation cases, it would place an absolute bar on the power of the courts to fashion a remedy calling for transportation beyond that deemed "reasonable" in the legislation. In so doing, it removes not one of a number of available options, but what may be the only effective remedy to redress a constitutional wrong.

The Supreme Court has held that where public officials have mandated the establishment of a racially segregated school system, reassignment of students is required to break up that segregated system. In many cases, reassignment can be accomplished only by busing.

The Court has placed its own limits on busing, holding that it will not be ordered where other remedies are adequate or where busing is so extensive as to infringe on the health and safety of children. Thus, the Johnston Amendment is directed only at busing that the courts have held is essential to remedy unconstitutional segregation.

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2. Congress lacks authority under section 5 of the fourteenth amendment to enact the Johnston Amendment. 14

Section 5 of the fourteenth amendment vests in Congress the "power to enforce, by appropriate legislation, the provisions of this Article." While the Supreme Court has held that Congress may *expand* on the protections of the fourteenth amendment, the Court has clearly stated (and in 1982 reaffirmed) that Congress may not *narrow* the guarantees of the fourteenth amendment beyond their judicially established scope. The Helms-Johnston Amendment would do just that -- deny a remedy the Supreme Court has held essential to cure the violation of a right guaranteed by the fourteenth amendment.

3. Congress lacks authority under article III to enact the Johnston Amendment. 19

Article III of the Constitution mandates the existence of the Supreme Court and specifies the cases in which it shall have original jurisdiction. The Supreme Court's appellate jurisdiction is subject to "such Exceptions, . . . as the Congress shall make." Congress also has substantial power over the structure of the lower federal courts, as the Constitution extends the judicial power to the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." While these clauses confer great authority on Congress, they cannot be read in isolation from the other parts of the Constitution.

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a. Johnston invades the essential role of the federal courts in our constitutional scheme. 21

Constitutional review by an independent federal judiciary -- not dependent on the public or Congress for tenure in office or continued compensation -- was the method chosen by the Framers to guard against excesses in the use of governmental power. This fundamental concept was reflected in Chief Justice Marshall's famous declaration in the 1803 case of Marbury v. Madison that: "It is emphatically the province and duty of the judicial department to say what the law is." That principle has ever since been respected.

To ensure that the judiciary did not exceed *its* constitutionally circumscribed role, the Framers adopted impeachment as "the only provision . . . consistent with the necessary independence of judicial character," and deliberately designed it to be much harder to achieve than ordinary legislation. High crimes and misdemeanors must be proven, and a two-thirds vote by the Senate is required for conviction.

Similarly, the amendment process reflects the conviction that questions of constitutional interpretation not be left to simple majorities and ordinary legislation. Article V specifies that the Constitution may be amended only by a two-thirds vote in each House of Congress and ratification by three-fourths of the states.

If Congress can nullify the results of a disfavored judicial interpretation of the Constitution by ordinary legislation, both of these safeguards -- impeachment and

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constitutional amendment -- are rendered superfluous, and a bare majority in Congress is given final powers of constitutional interpretation.

b. No precedent sustains the power asserted in Johnston. 28

The few judicial precedents that exist do not support the constitutionality of the Johnston Amendment. Indeed the only instance in which Congress tried to employ its article III jurisdictional powers to nullify a judicial interpretation of the Constitution was condemned as unconstitutional by the Supreme Court in the 1872 Klein case.

c. Even if limited to the lower federal courts, Johnston is unconstitutionally discriminatory legislation. 33

The Johnston Amendment clearly applies to all courts of the United States, including the Supreme Court. But even if it could be fairly construed to apply only to the lower federal courts, it would still be constitutionally deficient. While Congress has broad authority over the federal courts, the Constitution itself restricts that power in a variety of ways. First, article III is a constraint, in that Congress may not establish lower federal courts that are merely advisory bodies -- for example, by according courts jurisdiction over a class of cases but withholding their power to require necessary remedies.

Moreover, Congress may not use its article III power in a manner that denies rights secured under other sections of the Constitution. In particular, congressional power to allocate jurisdiction to federal and state courts over cases involving constitutional rights may not be exercised in a manner that denies the equal protection of the laws. For example, a statute providing that all constitutional claims made by minorities must be heard in state courts, while those of whites may be adjudicated in federal courts, would undoubtedly be held a racial classification, violating the equal protection guarantees of the due process clause. Similarly unconstitutional would be a statute making no mention of race on its face, but withdrawing jurisdiction only with respect to the types of constitutional claims made by racial minorities, such as claims under antidiscrimination housing ordinances.

Also, the Johnston Amendment is unconstitutional on equal protection grounds because it accords some constitutional claimants preferred status over others. It allows some the choice of either federal or state forums, while relegating others to state courts alone. Thus, it treats people differently on the basis of which constitutional rights they choose to exercise.

d. The availability of state court review does not save Johnston. 42

The constitutional defects of the Johnston Amendment are not cured simply because the state courts remain open to enforce constitutional rights. For one thing, any defendant in a state court action arising under the federal Constitution can remove that case to federal court. If the federal court

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cannot grant full and effective relief to plaintiffs -- necessarily the case if the Johnston Amendment were enacted -- defendants would certainly exploit that avenue.

Moreover, because the Johnston Amendment is directed at changing Supreme Court precedents, its sponsors are plainly inviting state court judges to disregard established constitutional law and thus dishonor their oaths to obey the United States Constitution. Unless that were to happen, the legislation would be pointless. Accordingly, state court judges, who are not protected by the federal Constitution's guarantees of tenure and compensation -- and many of whom face periodic popular elections -- would be subjected to substantial political pressures to disregard established law, thus subverting the judicial independence requirements of article III.

Finally, the Johnston Amendment could result in conflicting state court decisions defining important fourteenth amendment rights as state supreme courts come to different conclusions, and the United States Supreme Court remains powerless to exercise its appellate jurisdiction to establish uniformity.

B. By allowing Congress to rewrite the Constitution by majority vote, the Johnston Amendment would drastically alter our legal system. 46

The Johnston Amendment sets a dangerous precedent, inviting one-issue groups which disagree with a Supreme Court decision to bypass the constitutional amendment process and try to work their will through Congress. A future Congress could as easily restrict jurisdiction or remedies

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with respect to the fifth amendment's provisions protecting private property as today's Congress might with respect to the fourteenth amendment's provisions guaranteeing equal protection of the laws. Indeed, if Congress can by a simple majority rewrite essential elements of the Constitution, it can eliminate federal jurisdiction or remedies in all cases arising under the Constitution, leaving only the protection of the state courts. If state legislatures were to follow the example of Congress and deprive state courts of constitutional jurisdiction, there would cease to be any judicial protection of constitutional rights.

Moreover, congressional attempts to weaken the role of the judiciary would have far-reaching implications for the separation of powers which safeguards each branch from encroachment by the other. For example, it has not been so long since the federal courts turned back presidential efforts to infringe the powers of Congress by taking over steel mills, impounding appropriated funds, and resisting congressional subpoenas.

C. The Helms Amendment is unconstitutional legislation with dangerous policy implications. 50

The extent of the Helms Amendment's limitation on the Justice Department is unclear. One reading would prevent the Department from any involvement in a suit regarding school desegregation because that suit could lead directly or indirectly to busing as a remedy. A narrower reading would prevent the Department only from actively seeking busing as a remedy in any suit in which it was participating.

On either reading, the Amendment raises constitutional difficulties. First, the bill would violate the separation of powers principles which distinguish the legislative from the executive. Article II of the Constitution charges the President with "Care that the Laws be faithfully executed," yet the Helms Amendment would place constitutional litigation conducted by the Justice Department under the direction of Congress.

A second constitutional deficiency of the Helms Amendment is that it imposes unequal burdens on those seeking the protection of minority interests. The Helms' restrictions apply only to cases brought to remedy unconstitutionally segregated school systems; the Justice Department is not similarly restricted in other areas.

Senator Helms' bill also runs afoul a principle enunciated by the Supreme Court that the federal government is constitutionally prohibited from financially supporting segregated schools. In this context, the Helms Amendment must be evaluated with regard to other federal legislation dealing with federal funds for education. Through grant-in-aid programs enacted by Congress, the federal government provides substantial assistance to public education. However, Congress has passed laws restricting the authority of federal agencies other than the Justice Department to take action against federally-subsidized discrimination in school desegregation cases involving busing.

In Brown v. Califano, a federal court of appeals upheld these restrictions, but only because the Justice Department retained power to take effective action against unconstitutionally segregated schools. The court stated that if the Justice Department were unable or unwilling to enforce the law, the challenged amendments could be unconstitutional as applied. The Helms Amendment apparently would put the Justice Department in just that position.

In addition, the Helms Amendment raises the following policy considerations: 1) It would create a precedent for restricting the Executive's enforcement of other constitutional rights; 2) it would remove the Justice Department from school segregation cases, thus leaving courts only two poles of opinion -- the civil rights plaintiffs and the defendant school systems; and 3) it would place the entire financial burden of litigation on minority groups.

In short, if the Helms-Johnston Amendment is enacted and honored by the courts, it will shift the delicate balance of power among the three branches of government in a way which will undermine the constitutional role of the judiciary and, with the same stroke, demean the Constitution to the status of ordinary legislation. If the amendment succeeds in Congress and is struck down by the courts, the Congress will still have betrayed its constitutional oath and triggered

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a confrontation that cannot but send a signal to the judiciary to hedge and trim in sustaining claims that could result in popular outcry and further legislative remonstrations.

The Commission believes that Congress should reject the Helms-Johnston Amendment as unconstitutional legislation. In addition, bar associations and civil rights, civic and community organizations should mount campaigns in communities throughout the nation designed to create wider public understanding of the profound implications and dangers of the Helms-Johnston Amendment.

II. In espousing Helm-Johnston and in related actions, the Justice Department is seeking to limit the role of courts in protecting the rights of citizens. 61

The underlying rationale of the Helms-Johnston Amendment, that in interpreting constitutional rights courts should be responsive to the dictates of the majority, finds an echo in policy declarations and actions of the Administration. The Attorney General, who serves as the principal executor of the President's constitutional duty to take care that the laws be faithfully executed, has warned the courts to "heed the groundswell of conservatism evidenced by the 1980 election."

The Justice Department has clearly begun to follow through on that theme. It has assisted Congress in its attacks on the jurisdiction of the judiciary by supporting the Johnston Amendment before congressional committees. In addition, it has taken positions in cases pending before the federal courts urging them to give extraordinary deference to popular opinion and legislatures when the issues before them are controversial.

For example, despite a clear conflict with Supreme Court decisions calling for mandatory reassignment of students to break up segregated school systems, Justice Department officials continue to insist that they will seek only remedies that give all parents the option of rejecting desegregated schools. In a case in East Baton Rouge, Louisiana, the Department recently has proposed substitution of a voluntary plan for a mandatory remedy ordered by the court after years of intransigence and delay by local officials. While the stated rationale for reopening the court order is "white flight" from the public schools, the Department's criterion for a new plan is not effectiveness, but adherence to the rigid principle of voluntarism. The effect of the Department's argument, if sustained, would be to reward the school districts whose resistance spurs community opposition to desegregation and to impinge on the consistent holdings of the Supreme Court that such opposition is not a relevant consideration in the judicial effort to remedy unconstitutional segregation.

Similarly, a recent Department brief to the Supreme Court suggests unprecedented deference to legislatures. Articulating the government's broad approach to cases involving constitutional issues, the Solicitor General, in a "friend of the Court" brief, took the position that the proper role of the Court is only to identify the constitutional interest at stake, and then to allow the legislatures to say as a matter of "policy" what that interest means; that is, to define the bounds of the liberty or property identified by the Court, and to say how it should be enforced.

This analysis misapprehends the importance of the judiciary to our constitutional system. It is the very essence of the judicial mission to guard zealously the promise contained in the Bill of Rights that political majorities will not be allowed to harness the power of the state to oppress unpopular views. For the judiciary to be able to articulate a right but not to give it substance -- which is the effect of Helms-Johnston as well -- is to be consigned to a meaningless exercise.

The Commission urges that President Reagan reconsider his Administration's support of the Helms-Johnston Amendment and oppose it as unconstitutional and unwise legislation.

III. In addition to mandating continuation of unconstitutionally segregated school systems, the Helms-Johnston Amendment bars the implementation of desegregation programs that have been effective in improving educational opportunity 68

In Brown II, the Supreme Court's first decision on school desegregation remedies, it recognized that appropriate plans might vary from system to system, and that district court judges, because of their proximity to local conditions, were best situated to make the initial decisions.

The Helms-Johnston Amendment would usurp this entire judicial function, and substitute for the flexible, individually-applied test of workability contemplated by the Supreme Court, a blanket, irrebuttable presumption that court-ordered busing of more than 15 minutes or five miles in either direction is never feasible, and always poses an unjustifiable danger to the health of the children and the educational process. Helms-Johnston contains certain "findings" adopted by the Senate to support these busing limitations. Specifically, the findings are that:

(1) court orders that result in busing in excess of the bill's provisions have proven ineffective to achieve a unitary system;

(2) busing has resulted in "white flight" from school systems;

(3) transportation in excess of the bill's provisions is expensive and wasteful; and

(4) there is an absence of social science evidence to suggest that the benefits outweigh the disruptiveness of busing.

This report concludes that the findings of the Helms-Johnston Amendment are not supported by social science research or practical experience.

A. Busing has proved an effective method for establishing a unitary school system. 74

There is no evidence that demonstrates that the development and implementation of a sound desegregation plan, calling for mandatory student reassignments that require busing, is not an effective method for dismantling the vestiges of a prior, segregated system. Available evidence and common sense point in the opposite direction.

Research on the effectiveness of desegregation plans to reduce racial isolation shows that in every case where busing has been used as part of a plan to break up a segregated school system, school integration -- measured by the opportunity for interracial contact -- has increased. Moreover, a major new study of desegregation trends across the country finds that remarkable changes occurred in the South between 1968 and 1980, that were clearly related to policies and enforcement efforts by the courts and federal executive agencies.

B. Most desegregation plans involving busing have proved very stable; in others "white flight" is not ultimately prevented by barring busing. 77

In the decade between 1968 and 1978, when many of the nation's most comprehensive busing plans were implemented, there was a marked increase in minority students attending predominantly white schools. During that same period, the proportion of white students enrolled in public schools increased, and the proportion attending private schools declined. More significantly , the studies of social scientists show that, while in some circumstances school desegregation orders cause temporary dislocations, there is no lasting or significant relationship between "white flight" and school integration in the nation's largest cities.

Busing itself is not the issue. Indeed one-half of the nation's school children are bused to school -- only 3.6 percent of them as part of a desegregation plan. In many situations, court-ordered desegregation remedies do not cause even temporary "white flight." For example, small and medium-sized cities rarely experience "white flight" at all.

Similarly, but at the other end of the spectrum, metropolitan and county-wide plans, often involving extensive busing, have not only proved stable but in some cases have led to residential integration. A 1980 study found a trend toward increased residential integration in cities that had experienced metropolitan or area-wide desegregation for a minimum of five years. In explaining these results, the study notes that racial identification of schools historically has been an important factor in creating segregated neighborhoods. Once schools are no longer earmarked as white or black, racial barriers in housing are lowered. As residential integration grows, some communities have been able to decrease busing.

The controversy over "white flight" then has focused not on small cities or on metropolitan school districts, but rather on major cities with substantial minority school enrollments and desegregation plans that affect the center-city alone, not the suburbs. In these places, white suburbanization has been occurring for years for a variety of reasons that are essentially distinct from school desegregation. While significant decreases in public school enrollments have been noted in the period immediately surrounding the implementation of a desegregation plan, the decreases seem to be limited to the early pre- and post-implementation period. With few exceptions, by the third year of operation, the rate of decline in white enrollment has stabilized at pre-plan levels, and in some cases, is below pre-plan levels. Of course, the stability of desegregation plans may vary with the character of the plan and the quality of educational and community leadership.

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C. There is wide public support for desegregation involving busing in communities that have implemented desegregation plans. 90

Opinion surveys, such as the Harris poll, show that in the abstract most Americans favor integration of public schools, but oppose busing as a method of integration. If the two issues are linked, and busing is posited as a tool essential to accomplish desegregation, resistance to busing drops and more people favor than oppose it. Further, polls which deal with actual experience under court-ordered busing show a more favorable response than polls which deal with busing as an abstract notion.

There are reasons that most people, black and white, who have been involved with busing support it. Superintendents of schools and school board members testified before Congress as to the positive experiences their schools had had with busing. For example, in Charlotte-Mecklenburg, North Carolina, county-wide busing began in the 1970-71 academic year. In 1981, its superintendent told Congress that he "would prefer being superintendent in Charlotte-Mecklenburg to any other large school system in the country" because the community is now "a better place to live," and the overall quality of the schools is "better today than it would have been if the *Swann* decision had never been made."

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D. Desegregation provides educational and related benefits to all students not available in segregated schools. 95

  1. Desegregation has resulted in significant achievement gains for minority students. 96

Almost all current research regarded by the social science profession as methodologically sound concludes that under court-ordered desegregation remedies, the achievement level of minority students has risen and that of white students has not been adversely affected. A recent comprehensive report reviewing the results of 93 case studies, showed that not only did achievement scores for minority students rise in desegregated schools, but also that, on the average, their I.Q. scores rose as well. The largest gains have occurred under metropolitan and county-wide desegregation plans that usually involve extensive busing.

Among the explanations for these gains in achievement is that educational improvements and a substantial infusion of human and financial resources often follow court orders requiring middle class white students to attend previously all-minority schools. Other factors may include changes in teacher attitudes and expectations in heterogeneous classrooms, and higher community and student norms in integrated schools than in low income, racially isolated classrooms. One black student testified about her experience in a desegregated school that, "in my old school people asked, 'Are you going to college?' In my new school they ask, 'Which college are you going to?'"

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2. Desegregation has resulted in increased mobility and opportunity for minority students. 102

School desegregation results in other indirect educational and social benefits. For example, minority children attending desegregated schools are more likely to complete high school, attend college, select a four-year college, select a desegregated college, major in a field of study designed to lead to a more remunerative job, and finish college. Indeed, total enrollment of minority students in higher education surpassed one million in 1976, representing an increase of more than 100 percent from 1970 levels.

3. Desegregation has afforded white students broader educational and cultural experiences. 103

A very real but often ignored issue is that of collateral benefits to white students who may also be victims of racial isolation. A white high school senior from Charlotte-Mecklenburg stated, "I've been bused for five years and to be honest with you, I value that experience, my five years of busing, probably more than any of the educational things I've learned. Book learning is also good, but I learned to deal, I think, with people."

Desegregation plans have proved most successful and effective when accompanied by other educational improvements such as curriculum reform and teacher training. These improvements, often spurred by desegregation, have been financed by the Emergency School Aid Act. Yet the same Congress that is considering Helms-Johnston has abolished

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Emergency School Aid as a separate program and reduced federal aid to education.

Given the abundant evidence on the positive educational effects of desegregation, Congress and the President should reject Helms-Johnston and, instead, enhance financial and technical support to communities to enable them to meet their constitutional obligations to provide equal educational opportunity.

In addition, organizations concerned with public education should promote an awareness of the threat Helms-Johnston poses to equal educational opportunity.

IV. Enactment of the Helms-Johnston Amendment would seriously impair racial harmony in America by recreating racially dual school systems and promoting the perception that the United States government was repudiating its commitment to racial justice. 106

The Supreme Court took a major step forward when it ruled that racial segregation laws and policies violate the equal protection guarantees of the fourteenth amendment. That principle is imperiled by the Helms-Johnston Amendment.

The amendment would do more than place a prospective limit on busing. It contains a retroactive feature that would authorize a private citizen or the Attorney General to go to federal court to overturn school desegregation plans that have been in operation for any length of time if they entail more busing than is permitted in the amendment. The dissolution of remedies previously ordered and long since implemented threatens to reopen wounds that have healed, and to reawaken community and racial conflict in America.

INTRODUCTION

> I am aware of a hidden tendency in the United States leading the people to diminish judicial power; . . . I venture to predict that sooner or later these will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked. 1 A. de Tocqueville, Democracy in America 269 (J. P. Mayer ed.) (Garden City, N.J.: Doubleday, 1969).

> A federal judge yesterday refused to dismiss a constitutional challenge to Alabama's new school prayer law on grounds argued by the governor's son that God has sole jurisdiction in the case. Wash. Post, Aug. 3, 1982, at A 10, col. 1.

Members of the 97th Congress have introduced more than a score of bills intended to "diminish judicial power." Most of these bills propose to limit the authority of federal courts in cases involving busing for purposes of desegregation, abortion rights, or school prayer. These issues have been the subject not only of passionate national debate, but also of constitutional pronouncements by the Supreme Court of the United States. It is reasonable to conclude that congressional displeasure with these pronouncements is the cause of their selection as subjects for "court-stripping" proposals.

The pending bills are varied in their prohibitions. Some would deny courts jurisdiction to hear selected classes of constitutional cases, while others would forbid the granting of particular remedies. Similarly diverse is their reach. Some apply to all courts, others to all federal courts, and still others only to the lower federal courts. What is common among them is the intent of their sponsors to modify prevailing interpretations of the Constitution by the United States Supreme

Court to reflect what they believe to be popular political sentiment.[1]

It is this notion -- that courts should be guided by public sentiment in deciding constitutional issues, and may be curbed by legislation if their decisions conflict with popular will -- that is of the most serious concern to our Commission, and that we believe should be of concern to all Americans. It reflects a critical misunderstanding of the role of courts in this society, and of their duty to protect the rights of

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1/ For example, Senator Jesse Helms' (R.-N.C.) abortion proposal, offered on the floor of the Senate August 18, 1982, declared that in its 1973 Roe v. Wade decision, the Supreme Court "erred in excluding unborn children from the safeguards afforded by the equal protection and due-process provisions of the Constitution." Wash. Post, Aug. 19, 1982, at A 14, col. 4. Similarly, in a discussion of the Neighborhood School Act, its author, Senator Bennett Johnston (D.-La.), stated, "So what we have done on this amendment . . . would be to establish reasonable limits to tell the Supreme Court that what they have done has not worked . . .." Limiting the Jurisdiction of the Federal Courts: Hearings on S. 951 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm., 97th Cong., 2d Sess. (forthcoming) [hereinafter cited as 1982 School Desegregation Hearings] (statement of Senator Johnston, at 11) (June 17, 1982). In connection with legislation akin to Senator Johnston's Neighborhood School Act, Senator Helms stated, in response to a question about what to do in a circumstance where busing was the only remedy to address purposeful segregation, "[i]t depends . . . on who declares that no other remedy is available. This was precisely the problem in the past. The Federal Government with its bureaucracy and also with its courts has declared that there was no other remedy when, in fact, there were other remedies. This business of limiting the jurisdiction of the court -- I shall always believe that we are here to represent the people." Court-Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, 97th Cong., 1st Sess. 443 (1981) [hereinafter cited as Senate Hearings] (statement of Senator Helms).

minorities against the will of a hostile majority.

What is being proposed in legislation to curb the power of the courts is a radical reallocation of authority among the constituent elements of our tripartite government. Courts are fallible, of course, like all other institutions in society. But if the established mechanisms for correcting judicial error are radically enlarged, we will face new dangers to our liberties from legislative and executive excesses.[2] Today, the issues fueling this regressive movement are school desegregation, school prayer, and abortion. If the judiciary is restricted successfully in these areas, the issues of tomorrow may lead to restraints of the press or freedom of religion, or of the right to just compensation for property taken for public use.

One of the principal objectives of the Commission in issuing this report is to foster better understanding of the crucial role of the courts in protecting all persons from legislative and executive overreaching, and of the high stakes involved in current legislative efforts to impair that role.

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[2] The Senate Judiciary Committee, which unanimously condemned President Roosevelt's "court-packing" legislation, warned of the effect of that proposal in terms appropriate to this discussion:

> If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.

S. Rep. No. 711, 75th Cong., 1st Sess. 9 (1937).

For several reasons we have chosen to focus this report on one measure, the Helms-Johnston Amendment, which is designed to curb the authority of courts to protect constitutional rights in school desegregation cases. It requires our attention in part because it has advanced furthest in the legislative process, having been passed by the Senate, and because it has garnered the approval of the Department of Justice and the support of the Attorney General of the United States. More fundamentally, however, the debate over Helms-Johnston is important because it tests the ability of our constitutional system to protect minorities against oppression by the majority.

In Brown v. Board of Education, [3] the United States Supreme Court, acting against the deeply felt sentiments and long-entrenched traditions of many people in a wide region of the nation, commanded an end to the official caste system that separated minorities from whites in public schools and other public institutions. In the 28 years since Brown, courts, educators, civil rights groups, and communities throughout the country have struggled, amidst protest and conflict, to implement the decision. Their objectives have been to secure compliance with the Constitution, to provide equal educational opportunity for the victims of discrimination, and to create conditions for improved relations between the races.

The Helms-Johnston Amendment renders a sweeping verdict that these efforts have failed, and calls for their unraveling in a manner that challenges the continuing vitality of Brown itself. Thus, what is at issue here is not only the role of the courts in our constitutional system, but also the viability of efforts to provide those who have suffered racial discrimination the opportunity to become full participants in society, and the ability of the system to resolve thorny conflicts in a way that permits people to live in harmony. With implications so profound, the Amendment's legal foundations, as well as the factual and policy assumptions on which it is based, must be examined with the greatest care.

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[3] 347 U.S. 483 (1954) [hereinafter cited as Brown].

For all of these reasons, we believe that David Brink, speaking as President of the American Bar Association, did not overstate the case when he termed court-curbing bills "a legislative threat to our nation that may lead to the most serious constitutional crisis since our great Civil War."[4] The continuing debate over Helms-Johnston and similar bills is one of the most important in our history. It should command the attention and involvement of all who care about the future of the Nation.

I. A LEGAL ANALYSIS OF THE HELMS-JOHNSTON AMENDMENT

On March 2, 1982, the Helms-Johnston Amendment passed the Senate by a vote of 57 to 37 as a rider to the Department of Justice Appropriation Authorization Act (S. 951). It still is pending before the House, where it has been the subject of hearings in a subcommittee of the House Judiciary Committee. The Amendment consists of two sections: section 2, the Johnston Amendment, which is known officially as the "Neighborhood School Act of 1982"; and section 3(1)(D), the Helms Amendment, also known as the "Collins Amendment," which passed the House separately in June 1981.

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[4] N.Y. Times, Jan. 25, 1982, at A 19, col. 4.

The Johnston Amendment is based on congressional "findings" that court-ordered busing for the purpose of racial desegregation has been ineffective, increased racial imbalance, and been expensive and not cost-effective. 5/ It declares that "assignment of students to public schools closest to their residence (neighborhood public schools) is the preferred method of public school attendance." The effect of the Johnston Amendment would be to limit court-ordered busing to the nearest school, or to schools within 15 minutes or five miles of the student's home. 6/

The substantive provisions of the Johnston Amendment are addressed both to the federal courts and to the Department of Justice. Section 2(d) of the Amendment would add a new section

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5/ For further discussion of the social science data pertinent to these "findings," see *infra* section III.

6/ Exceptions are made where more extensive transportation is required for a student's voluntary attendance at magnet, vocational, technical, or other specialized schools, or where such transportation is "reasonable." The Johnston Amendment identifies certain forms of transportation as unreasonable *per se*, however, including, transportation exceeding 30 minutes or ten miles round trip per day -- unless it is to the public school closest to the student's home.

(c) to the "all writs" provision of the United States Code,[7] providing that:

> No court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence . . ..

Section 2(f) would amend Title IV of the Civil Rights Act of 1964[8] to authorize the Attorney General, on complaint of a student or parent that the student was subject to an order requiring transportation in violation of the Johnston Amendment's limits, to file suit in federal district court to enforce its proscriptions. Further, section 2(g) would permit the Attorney General to reopen decided cases that required a greater degree of busing, even if the challenged court order was entered before the effective date of the legislation.

The Helms Amendment is directed exclusively at the Justice Department. It provides that:

> No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home except for a student requiring special education as a result of being mentally or physically handicapped.

7/ The "all writs" section of the Code, 28 U.S.C. § 1651(a), begins, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary. . .."

8/ 42 U.S.C. § 2000c-6(a) (as amended).

Legal analyses of Helms-Johnston have focused chiefly on the question of whether Congress constitutionally may restrict the remedies available to federal courts in school desegregation cases, and limit the Justice Department's powers to enforce the civil rights statutes of the United States.[9] The Amendment explicitly relies on Congress' power under article III, section 1, of the Constitution, and under section 5 of the fourteenth amendment.

This report concludes that neither of these constitutional provisions provides the support asserted by the Amendment's sponsors, and that the Helms-Johnston Amendment is unconstitutional.

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[9] The issue here is not whether Supreme Court decisions with respect to busing and school desegregation have been either wise as a matter of policy or correct as a matter of constitutional interpretation. The question is far more fundamental. It is whether Congress possesses the power to change by simple legislation specific, constitutionally required remedies, ordered by the federal courts and enforced by the executive. In its opposition to the Helms-Johnston Amendment, the American Bar Association ("ABA") described this essential issue in the following terms:

> The ABA believes that our members and all Americans are entitled to their own views on these social issues and even on the court decisions that declare them. The ABA therefore takes no position on the underlying subject matters of the bills. But we object strongly to the process they utilize. For they propose to change the constitutional law by simple legislation, instead of by the means provided in the Constitution.

1982 School Desegregation Hearings, supra note 1 (statement of David R. Brink, President, ABA, at 3) (July 15, 1982) [hereinafter cited as Brink].

A. Constitutionality of the Johnston Amendment

1. Busing and the Fourteenth Amendment

The Johnston Amendment is one of many bills recently introduced in Congress that would restrict the powers of the federal courts in designated areas. Unlike those bills that would remove federal court jurisdiction over certain subjects, the Johnston Amendment would limit only the remedies available in federal courts. School desegregation would remain subject to federal jurisdiction, and courts could fashion injunctive relief for school systems found to be unconstitutionally segregated. However, that relief could not include student transportation beyond the limits deemed "reasonable" in the legislation.

Accordingly, the first critical question is whether the legislation merely removes one of a number of remedies available to redress a constitutional wrong, or whether it removes what may be the only remedy. If the former is true, the Johnston Amendment might be constitutionally unobjectionable. But if the latter is true, the constitutionality of the Amendment would depend on whether Congress has the authority to narrow or eliminate the power of the federal courts to order remedies declared by the Supreme Court to be constitutionally required. In response to just this question Professor Lawrence Sager of New York University Law School has noted that "[d]epriving the Federal courts of the power to issue any adequate remedy in particular cases is the functional and constitutional equivalent of denying them jurisdiction to hear those cases at all."[10]

In Brown v. Board of Education, the Supreme Court, relying upon the Equal Protection Clause of the fourteenth amendment, declared that "racial discrimination in public education is unconstitutional . . .. All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle."[11] In the quarter century since Brown, the federal courts have grappled with the vexing problem of designing appropriate remedies in those instances where "school authorities [have] fail[ed] in their affirmative obligations" to eliminate school segregation.[12] A number of remedies have been identified; the selection of any particular one is dependent on the nature and extent of the constitutional violation that must be redressed. But it is clear from the Supreme Court's opinions that where public officials have mandated the establishment of racially segregated school systems, mandatory reassignment of students is required to break up the segregated system. It is equally clear from the Court's decisions that in many circumstances, such reassignment can only be accomplished by using the familiar tool of busing.[13]

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[10] Sager, Constitutional Limitations of Congress' Authority to Regulate the Jurisdiction of the Federal Courts 8 (undated) (unpublished condensation of Sager, The Supreme Court, 1980 Term, 95 Harv. L. Rev. 17, 85-89 (1981)).

[11] Brown v. Board of Education, 349 U.S. 294, 298 (1955) [hereinafter cited as Brown II] (relying upon fundamental principles declared in Brown).

[12] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971).

In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court approved a busing plan ordered by the district court, holding that "[d]esegregation plans cannot be limited to the walk-in school."[14] In a companion case, North Carolina State Board of Education v. Swann, the Court invalidated North Carolina's effort to prohibit race-conscious busing.[15] Writing for a unanimous court, Chief Justice Burger stated that "bus transportation has long been an integral part of all public school systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[16] Indeed, the Court declared that pupil assignment may be "the one tool absolutely essential" to remedy unconstitutional school

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13/ Much confusion has resulted from the popular and often careless use of the term "busing" in a way that suggests that it is an end in itself, a remedy for school segregation, rather than a means for carrying out constitutionally required pupil reassignments. For example, critics of court-ordered busing frequently contend that there are a variety of methods, *e.g.*, redrawing attendance zone boundaries and pairing schools, that courts might choose in preference to busing. But in using those methods to reassign students from segregated schools, busing is almost always necessary. Indeed, courts rarely discuss busing *per se*, except to state that a desegregation plan may not require transportation so extensive as to risk injury to the health or education of children. In this report, we will use the term "busing" in a shorthand way, but it should be understood to describe only a way of facilitating the reassignments needed for desegretation.

14/ 402 U.S. at 30.

15/ 402 U.S. 43 (1971)

16/ *Id*. at 46.

segregation and that its absence "would render illusory the promise of Brown v. Board of Education . . . ."[17]

In Milliken v. Bradley [18] and Dayton Board of Education v. Brinkman, [19] the Supreme Court made it clear, however, that even when it is proved that public officials have violated the Constitution by engaging in deliberate, segregative acts, the remedy may be no broader in scope than is needed to correct the constitutional violation. In those cases, the Court disapproved plans ordered by lower courts because the constitutional violations were not so extensive as to require the degree of busing that the plans entailed. As a result of these cases, federal courts can order busing only to the extent that it is demonstrably essential to provide the victims of unconstitutional segregation with an adequate remedy. [20] In short, under Supreme Court decisions, the right and the remedy must be coextensive.

Busing, therefore, is not merely one of a number of equally favored remedial options from which a district court may choose when fashioning constitutional relief. In fact, busing is not an "option" at all. Where no other remedy is available to secure the rights guaranteed by the fourteenth amendment, busing becomes nothing less than a constitutional requirement.[21] Accordingly, the Johnston Amendment cannot be sustained on a claim that it merely reflects a congressional preference for certain remedies over others in a manner that does not infringe recognized constitutional rights.

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[17] Id.

[18] 418 U.S. 717 (1974).

[19] 433 U.S. 406 (1977).

[20] For further discussion of the limits courts have imposed on the use of busing as a tool for desegregation, see infra text accompanying notes 147-49.

Similarly, the argument that the Amendment is sufficiently flexible to permit courts to order the degree of busing necessary to remedy any constitutional violations fails because the Amendment's time and distance limitations would prohibit many busing plans that have been found to be constitutionally required. [22] Indeed, the Amendment would invalidate the desegration plan in the Swann case itself, where transportation for elementary school students averaged about seven miles and took up to thirty-five minutes one way.[23]

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[21] For these reasons, the Department of Justice's assertions that busing "is not a constitutional end in itself" (quoting Crawford v. Los Angeles Board of Education, 102 S. Ct. 3211 (June 30, 1982)), and that in some circumstances the Supreme Court has recognized that the costs of busing may render its use inadvisable, are beside the point. 1982 School Desegregation Hearings (statement of Theodore B. Olson, at 4-6) (July 22, 1982) [hereinafter cited as Olson]. What is relevant is that in some circumstances, only pupil reassignment facilitated by busing will suffice to right a constitutional violation. Thus, the Department's entire presentation was deficient because it was premised on the assumption that busing is merely "a remedy," and does not recognize that when busing is used, it is because it is the sole constitutionally adequate remedy.

[22] Even plans involving times and distances less than five miles and 15 minutes could be invalidated under the Johnston Amendment, as it calls for subjective determinations of whether such plans are "likely" to aggravate "racial imbalance" or have a "net harmful effect on the quality of education."

Once it is recognized that busing is sometimes obligatory under the constitutional standards established by the Supreme Court, it is apparent that the Johnston Amendment can be a valid legislative enactment only if the Constitution grants authority to Congress to limit or qualify those standards. Without such authority, the Amendment would violate the fourteenth amendment because "it operate[s] to hinder vindication of federal constitutional guarantees."[24]

2. Congress' Power Under Section 5 of the Fourteenth Amendment

Section 5 of the fourteenth amendment vests in Congress the "power to enforce, by appropriate legislation, the provisions of this Article." In Katzenbach v. Morgan,[25] the Supreme Court held that section 4(e) of the Voting Rights Act of 1965, which had the effect of invalidating a New York literacy requirement for voting, was appropriate legislation to enforce the fourteenth amendment despite the fact that the Court previously had held that literacy tests did not violate the fourteenth amendment. The Court found that section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and said further that the courts should defer to Congress' exercise of that authority.[26] The Court declared that "it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's . . . literacy requirement . . . constitute[s] an invidious discrimination in violation of the Equal Protection Clause."[27]

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[23] In fact, the times and distances entailed in the desegregation plan approved in Swann did not exceed those required by busing for other purposes in Charlotte-Mecklenburg. In some communities, desegregation plans actually have resulted in a decrease of busing times and distances. Ironically, the Johnston Amendment would bar these plans anyway if busing, though decreased from pre-desegregation levels, still exceeded the statutory limit.

[24] See North Carolina Board of Education v. Swann, 402 U.S. at 45.

[25] 384 U.S. 641 (1966).

But the broad language of Morgan does not support the congressional proscriptions in the Johnston Amendment. Morgan upheld a voting standard that expanded the protections of the fourteenth amendment as then understood by the Supreme Court. It did not diminish those protections, as would the Johnston Amendment. In fact, the majority in Morgan explicitly held that Congress cannot narrow the guarantees of the fourteenth amendment beyond their judicially-established scope:

> We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing States to establish racially segregated systems of education would not be -- as required by § 5 -- a measure "to enforce" the Equal Protection Clause since

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[26] Id. at 651.

[27] Id. at 656.

> that clause of its own force prohibits such state laws.[28]

After the recent opinion of the Supreme Court in Mississippi University for Women v. Hogan,[29] little doubt remains about the reach of congressional power under section 5. Writing for the Court, and quoting from the passage in Morgan that appears immediately above, Justice O'Connor declared that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[30] The Johnston Amendment would be just such a law; it would deny a remedy that the Supreme Court has held to be essential to the right to a desegregated education.[31]

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[28] Id. at 651 n.10 (emphasis added). This statement responded to the dissenting opinion of Justice Harlan which warned that section 5 power could work two ways -- to increase or to dilute the substance of equal protection.

[29] 102 S. Ct. 3331 (July 1, 1982), aff'g 646 F.2d 1116 (5th Cir. 1981) and 653 F.2d 222 (5th Cir. 1981).

[30] Id. at 5072. The Court's reliance in Mississippi University on the Morgan dichotomy between congressional expansion of judicially-founded rights and congressional restriction or dilution of such rights is significant because an intervening case, Oregon v. Mitchell, 400 U.S. 112 (1970) -- certain parts of which are relied on by Senator Johnston -- reconsidered the scope of congressional power under section 5 without reaching a clear resolution. (Five Justices wrote opinions in Mitchell, no one of which commanded a majority.) The one other case in which the Supreme Court has upheld a statutory remedy enacted pursuant to section 5, Fullilove v. Klutznick, 448 U.S. 448 (1980), is consistent with its Mississippi University decision. In Fullilove -- as in Morgan -- the Congress had prescribed a remedy for denials of equal protection beyond those that were judicially mandated. The Court upheld that remedy -- a ten percent set-aside of federal funds for public works projects to be used to procure services or supplies from minority-owned businesses -- as a congressional effort to remedy the effects of prior discrimination.

The Department of Justice concedes that "§ 5 does not authorize Congress to contract or withdraw constitutional rights," but nonetheless concludes that the Helms-Johnston Amendment is within its section 5 powers.[32] This argument is based on a false distinction between the Johnston Amendment, which the Department claims only establishes "reasonable limits" on busing, and the Supreme Court's holding in North Carolina Board of Education v. Swann,[33] which invalidated a statute that foreclosed busing altogether. The reason for the Court's holding in Swann II was that the statute precluded the only *effective* remedy for unconstitutional segregation. Thus, whether the Justice Department or the Congress deems the Johnston Amendment's limitations on busing to be "reasonable" is immaterial. The fact is that those limitations would prevent the courts from ordering an effective remedy for unconstitutional segregation in every case in which a greater degree of busing was required to dismantle a dual school system. For that reason, section 5 plainly cannot countenance the Johnston Amendment.[34]

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[31] Senator Johnston argues that his Amendment does not curtail rights, but rather sets reasonable guidelines for remedies. However, as already discussed, the remedy-right distinction does not pertain in school desegregation cases because busing is only used if necessary to remedy a particular violation. Nor does the Amendment simply set guidelines. It prohibits busing beyond fixed limits. As even the Attorney General recognizes:

> Under § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation.

1982 School Desegregation Hearings, *supra* note 1 (letter from Attorney General William French Smith to Hon. Peter W. Rodino, Chairman, House Judiciary Comm., at 10) (May 6, 1982).

[32] Olson, *supra* note 21, at 22.

[33] 402 U.S. 43 (1971) [hereinafter cited as Swann II].

There is also another, independent reason why the Johnston Amendment is not supportable under section 5. The power of section 5 is a power of Congress against the states -- not a power of Congress against the courts. The history of the fourteenth amendment offers no precedent for Congress' use of its section 5 power against the courts. In his study of Congress' powers and busing, Professor Ronald Rotunda of the University of Illinois Law School concluded:

> Whatever the reach of section 5 as a vehicle for augmenting the power of Congress to regulate matters otherwise left to the states, it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal

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[34] In light of the dramatic differences in local conditions, the inflexibility of a nationwide requirement that round trip travel not exceed 30 minutes or ten miles is particularly troublesome. For example, the great expanses of Nevada generally call for far longer commutes than densely populated areas such as Columbus, Ohio, and Philadephia, Pennsylvania.

judicial determinations of the requirements of the fourteenth amendment.[35]

3. Congress' Authority Under Article III

Congress' power to regulate federal court jurisdiction is conferred by article III of the Constitution, the article establishing and defining the judicial power. Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court" -- thereby specifically mandating the existence of the Supreme Court -- "and in such inferior Courts as the Congress may from time to time ordain and establish." Article III also states that the judicial power of the United States shall extend to various categories of cases, including "all Cases . . . arising under this Constitution." Article III provides that in some of these cases the Supreme Court shall have original jurisdiction, but it goes on to state that in "all the other Cases . . . , the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make."[36]

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[35] Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L.J. 839, 859 (1976).

For similar reasons, section 5 provides no authority for the Amendment's restrictions on the Justice Department. As former Attorney General Civiletti has testified, the retroactive provision of the legislation would conflict with the Executive's oath to uphold the Constitution:

> The Constitution nowhere grants the Legislature the power to direct the Executive branch in carrying out its constitutional duties . . .. [The Johnston provision] would appear in the U.S. Code immediately following the very provision authorizing him to institute a remedial suit when he receives a complaint that a person is being subjected to unconstitutional segregation . . ..[There is] a fundamental unresolved conflict raised by this legislation between the executive duty of the Attorney General to seek judicial relief from constitutional violations and restrictive legislative direction to challenge appropriate remedies designed to provide precisely that kind of relief.

1982 School Desegregation Hearings, *supra* note 1 (statement of Benjamin Civiletti, at 2) (July 15, 1982).

According to the proponents of the Johnston Amendment, this "Exceptions Clause" gives Congress the power to curtail Supreme Court appellate jurisdiction over school desegregation in the manner that would be affected by the legislation. Moreover, they assert that Congress' power to "ordain and establish" the lower federal courts gives Congress plenary authority to curtail or even eliminate those courts' powers in particular areas, in any manner that a majority of Congress deems appropriate.

These clauses unquestionably confer substantial powers on the Congress to regulate the structure of the judiciary. But they cannot be read in isolation from the other provisions of the Constitution -- including the amendment process described in article V, the Supremacy Clause of article VI, the express limitations on government power set forth in the Bill of Rights and later amendments, and, indeed, its overall plan of our form of government, and the essential role played by the Supreme

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[36] U.S. Const. art. III.

Court. Indeed, the Department of Justice concedes that Congress may not make "exceptions to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers," and that the Exceptions Clause must be read in light of other external limitations on congressional power contained in the Bill of Rights and elsewhere in the Constitution.[37] As Chief Justice Marshall said in McCulloch v. Maryland, "[W]e must never forget that it is a constitution we are expounding."[38] Under these standards, it appears that the Johnston Amendment cannot withstand constitutional scrutiny.

The Essential Role of the Federal Courts in Our Constitutional Scheme -- In The Federalist No. 47, Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."[39] Thus it is that the first three articles of the Constitution describe with specificity the limited powers granted the three branches of the federal government. The safeguard chosen by the Framers against the exercise of those powers beyond their constitutional limits was review by an independent federal judiciary, one not dependent upon the public or Congress for tenure in office or continued compensation.[40]

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[37] Letter from Attorney General William French Smith to Hon. Strom Thurmond, Chairman, Senate Judiciary Comm., at 2 (May 6, 1982) (available from the Office of the Attorney General of the United States).

[38] 17 U.S. (4 Wheat.) 316, 407 (1819).

[39] The Federalist No. 47, at 302 (J. Madison) (J. Madison ed.) (Washington, D.C.: J. Gideon, Jr., 1818).

In proposing the Bill of Rights, Madison explained that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive."[41] And, in The Federalist No. 78, Hamilton explained that the critical function of federal judges could be protected only if those judges had the maximum degree of independence necessary to assure that limitations on legislative authority would be enforced:[42]

> Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the

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[40] See The Federalist No. 47, supra note 33, at 301; The Federalist No. 48, at 314 (J. Madison) (J. Madison ed.) (Washington, D.C.: J. Gideon, Jr., 1818). The article III provisions providing life tenure for judges and prohibiting diminution of compensation while judges are on the bench were designed to ensure that the federal judiciary would be immune from the influence of passing majorities in the political branches. Federal judges are unique in our political system in that none is subject to intimidation by ballot.

[41] 1 Annals of Cong. 457 (J. Gales ed. 1789) (statement of Representative James Madison)(remarks titled "Amendments to the Constitution").

[42] It was recognized early in the Constitutional Convention that some institution must possess the power to strike down state laws in conflict with national laws. Initially, the delegates disagreed about the appropriate institution to wield that power. Some proposed that Congress be given the power to veto state legislation. But eventually, the Madisonian position that "the jurisdiction of the Supreme Court must be the source of redress" prevailed. 2 Farrand, Records of the Constitutional Convention 589 (1911).

> manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[43]

These fundamental concepts were reflected in Marbury v. Madison, and particularly in Chief Justice Marshall's famous declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[44] More than a century and a half later, in the Little Rock school desegregation case of Cooper v. Aaron, the Supreme Court firmly reiterated the importance of this principle, stating that Marbury had "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[45] And at the end of its most recent term, the Supreme Court reaffirmed the importance of an independent judiciary "to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial."[46]

While the Founding Fathers recognized that the judiciary was the weakest of the three branches -- having neither the sword of the Executive nor the purse of the Congress, and with its authority limited to the resolution of "cases" and "controversies"[47] -- they acknowledged that the judiciary, just as the other branches of government, might exceed its constitutionally circumscribed role. The remedies adopted to protect the constitutional system against this possibility, however, were carefully and deliberately limited.

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[43] The Federalist No. 78, at 484-85 (A. Hamilton) (J. Madison ed.) (Washington, D.C.: J. Gideon, Jr., 1818).

[44] 5 U.S. (1 Cranch) 137, 177 (1803).

[45] 358 U.S. 1, 18 (1958).

[46] Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892, 4894 (U.S. June 28, 1982). This independence must "be jealously guarded." Id. at 4895. See also United States v. Will, 449 U.S. 200, 217-18 (1980).

Hamilton, conceding the possibility that judges "may substitute their own pleasure for the constitutional intentions of the legislature," stressed that the "precautions" taken to ensure the "responsibility" of federal judges were to be found solely in the Constitution's provision for impeachment: that is "the only provision on the point which is consistent with the necessary independence of judicial character."[48] Impeachment was deliberately designed to be much harder to effect than ordinary legislation. An indictment for high crimes and misdemeanors had to be proven, after which a two-thirds vote of the Senate was required for conviction.[49]

While not designed explicitly as a check on the judiciary, article V of the Constitution also reflects the Framers' conviction that questions of constitutional interpretation were not to be left to simple majorities and ordinary legislation. It describes the only legitimate method for changing the content of constitutional guarantees -- the amendment process. Here again, the process is difficult. A constitutional amendment requires a vote of two-thirds of each house of Congress, and ratification by three-fourths of the states.[50]

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[47] See The Federalist No. 78, supra note 43.

[48] The Federalist No. 79, at 493 (A. Hamilton) (J. Madison ed.) (Washington, D.C.: J. Gideon, Jr., 1818).

[49] U.S. Const. art. I, § 3, and art. II, § 4.

Supporters of the Johnston Amendment are undoubtedly correct when they claim that legislative supremacy is at the heart of our democracy. But that does not legitimate the Johnston Amendment, because the sole constitutional mechanism for overturning unpopular decisions is by amendment to the

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[50] In respect of the amendment process, George Washington declared in his farewell address to the nation:

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.

Washington, Washington's Farewell Address to the People of the United States 8, Sen. Doc. 5, 96th Cong., 1st Sess. (Washington, D.C.: U.S. Printing Office, 1979).

Constitution,[51] with its carefully structured super-majority requirements.

The infirmities of the Johnston Amendment become evident in the context of these constitutional provisions for impeachment and amendment.[52] If Congress can nullify the results of a disfavored judicial interpretation of the Constitution through the manipulation of jurisdiction by mere legislation, which at the same time denies the states their role in the amendment process,[53] both of these safeguards -- impeachment and constitutional amendment -- are rendered superfluous, and a bare

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[51] In this context, a comment may be in order on H.J. Res. 56, Representative Ronald Mottl's (D.-Ohio) proposed constitutional amendment prohibiting the assignment of school children to achieve desegregation. The text of the Mottl amendment provides:

> No court of the United States shall require that any person be assigned to, or excluded from, any school on the basis of race, religion, or national origin.

While the intent of the amendment, like that of the Johnston legislation, is to limit the remedial alternatives available to federal courts, it attempts to accomplish this aim by the constitutionally prescribed method defined in article V. Because it would amend the Constitution, and because of the breadth of its language, the effect of the Mottl amendment probably would extend far beyond anything that the sponsors of the Johnston bill hope to achieve. It is so broad that it could be interpreted to restrict the courts' authority to order any "race conscious" remedy needed in a school desegregation case, including, for example, redrawing school attendance boundaries, directing new school construction, closing obsolete facilities, and ordering school consolidations. Moreover, because the amendment is not expressly limited to public schools, its adoption also could have broadly intrusive and unpredictable effects on private institutions. In any case, because it would become part of the Constitution, a broad reading could be expected -- with a vast range of potential implications that cannot be foreseen.

[52] The Johnston Amendment is not the first bill that has been proposed to curtail busing by limiting federal court jurisdiction. One such measure, proposed during the Nixon Administration, drew strong criticism from Alexander Bickel, a conservative critic of the manner in which courts ordered busing, and a leading constitutional scholar of his generation. Bickel unequivocally opposed the bill as an effort to attack busing by eroding the courts' customary and long-established jurisdiction:

> Much as I agree that the courts have gone

(Footnote continued)

> substantially wrong of late in administering the rule of *Brown v. Board of Education* by tending to view mass integration as the be-all and end-all of school policy, I deplore as more destructive than the worst of busing the attempt [of these "busing bills"] to work such a reallocation of powers between Congress and the Supreme Court. I would deplore it even if I were convinced, as I am not, that no alternative course of action was available, that there was nothing but this last resort. And I would deplore it even if I were convinced, as I am not, that the institutional cost that the President is willing to pay will be incurred for the sake of a solid and thorough solution of the problems the courts have created.

Bickel, *What's Wrong with Nixon's Busing Bills?*, The New Republic, April 22, 1972, at 21.

[53] The Johnston Amendment would deny the states their constitutional role in the amendment process by effectively altering the prevailing interpretation of the Constitution without their involvement. For further discussion of this point, see Ratner, *Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365, 1371-74 (1953); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts*, 124 U. Pa. L. Rev. 45 (1975); Note, *The Nixon Busing Bills and Congressional Power*, 81 Yale L.J. 1542 (1972); Gewirtz, *Why Proposed Legislation to Restrict Federal Court Jurisdiction Is Unwise and Unconstitutional*, 127 Cong. Rec. S3914 (daily ed. April 9, 1981). *See generally*, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 330-34, 362-65 (2d ed. 1973).

majority of the Congress is given unreviewable powers of constitutional interpretation. As a recent report by the Committee on Federal Legislation of the Bar of the City of New York concluded, "[S]uch a result would impair the tripartite balance of power in our constitutional system and would be inconsistent with the intentions of the draftsmen of the Constitution."[54]

The Case Law -- Notwithstanding that the Johnston Amendment interferes with the independent and essential role of the judiciary in our constitutional scheme, and is outside the tradition of separation of powers, a complete analysis requires that it also be evaluated in the light of case law and the history of court-Congress relations. However, very few cases provide pertinent guidance on its constitutionality because no such legislation ever has been enacted -- despite the fact that similar bills often have been introduced in Congress. As former Attorney General Elliot Richardson told the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, "Congressional attempts to limit the jurisdiction and remedies of the federal courts are not unprecedented. What would be unprecedented, however, is the passage of such legislation."[55] What few judicial precedents do exist, however, do not support the assertions of Helms-Johnston partisans that the Johnston Amendment is constitutional.

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[54] Committee on Federal Legislation, *Jurisdiction-Stripping Proposals in Congress: The Threat to Constitutional Review*, 36 Rec. A.B. City N.Y. 557, 600-01 (1981).

[55] 1982 School Desegregation Hearings, *supra* note 1, (statement of Elliot Richardson, at 1) (July 15, 1982).

Proponents of the Amendment most often cite Ex parte McCardle [56] in support of the proposition that the Congress enjoys unfettered discretion to limit the jurisdiction of the Supreme Court. In McCardle, the Supreme Court upheld Congress' power to repeal the Court's appellate jurisdiction to review habeas corpus cases pursuant to an 1867 federal statute. That outcome, together with the following oft-quoted language in the Court's opinion, is read by some to establish the broad proposition that Congress has plenary power to abrogate Supreme Court jurisdiction under the Exceptions Clause of article III:

> The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
>
> We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.[57]

However, the McCardle case cannot support the broad reading advocated by Helms-Johnston's proponents. As an initial matter, McCardle involved a right conferred by an act of

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[56] 74 U.S. (7 Wall.) 506 (1869).

[57] Id. at 514.

Congress, not by the Constitution.[58] Moreover, the Supreme Court explicitly and carefully stated that Congress' repeal did not affect other jurisdictional statutes giving the Court power to review habeas corpus decisions:

> Counsel seem to have supposed, if effect be given to the repealing Act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The Act of 1868 [the repealer] does not except from that jurisdiction any cases but appeals from Circuit Courts under the Act of 1867. It does not affect the jurisdiction which was previously exercised.[59]

The following term, the Supreme Court expressly held that it had appellate jurisdiction over cases of habeas corpus pursuant to the Constitution, the Act of 1789, and other federal statutes.[60] The Court suggested that any attempt by Congress to remove its entire jurisdiction in habeas corpus cases would impinge on one of the Court's essential functions, and thus raise constitutional difficulties.[61]

So, far from establishing Congress' broad power to limit the Supreme Court's appellate jurisdiction, McCardle actually stands for the proposition that, at least where a claim of federal right is denied by a lower court, Congress may withdraw one jurisdictional basis for review only if another is available. The Johnston Amendment, however, would withdraw jurisdiction completely.

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[58] Id.; see also Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1867).

[59] 74 U.S. (7 Wall.) 506, 515.

[60] See Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1869).

[61] Id. at 96-103.

The only other case that squarely addresses Congress' authority to legislate exceptions to the Supreme Court's appellate jurisdiction is United States v. Klein,[62] in which the Court held that Congress' authority was limited by the separation of powers doctrine. The Klein case involved a federal statute that prevented former Confederate partisans who had obtained presidential pardons from receiving compensation for war-time expropriations, and also deprived the federal courts of jurisdiction to hear and review their claims. The Court observed that:

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny pardons granted by the President the effect which this court had adjudged them to have.[63]

In other words, the Court found that the statute was intended to derogate the jurisdiction of the courts, including the Supreme Court, in order to nullify the constitutional prerogatives of the Executive, as previously interpreted by the Court. The Court concluded that while Congress had significant power to regulate the Court's jurisdiction, it could not use that power to prescribe particular judicial outcomes without violating the constitutional principle of separation of powers. The Court stated:

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[62] 80 U.S. (13 Wall.) 128 (1872).

[63] Id. at 145.

> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
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> * * *
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct.[64]

In the final analysis, the fact that the Congress phrased the 1870 statute in jurisdictional terms was not dispositive because its effect was to infringe the President's constitutional power to grant pardons,[65] and the Court's power to give them effect. Just as the impermissible purpose of the 1870 statute was to nullify judicial orders giving effect to the decision of a co-equal branch of government, the impermissible purpose of the Johnston Amendment is to nullify judicial decisions, including *Brown* and its progeny, giving effect to the fourteenth amendment.

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[64] *Id.* at 146-47. The ABA has summarized the direct relevance of *Klein* to the Johnston Amendment as follows:

> Suffice it to say that [*Klein*] . . . establishes that if a lower federal court has jurisdiction of the subject matter, Congress cannot, under the guise of limiting jurisdiction, dictate to the court in a constitutional case what facts shall be determinative, what legal processes shall be used and how the cases shall be decided. But this is precisely what S. 951 purports to do in its conclusive presumptions as to what busing shall be deemed unreasonable.

Brink, *supra* note 9, at 10.

[65] *See* U.S. Const. art. II § 2.

It should be noted that *Klein* is the only case involving an attempt by the Congress to use its article III powers to nullify a judicial interpretation of the Constitution -- and the attempt was condemned as unconstitutional by the Supreme Court.

Congressional Power Over the Lower Federal Courts -- In an effort to avoid what it concedes to be the "serious constitutional questions associated with attempts to restrict Supreme Court jurisdiction," the Justice Department has argued that the Johnston Amendment should be read only to apply to the inferior federal courts, and not to the Supreme Court.[66] But this requires a more heroic reading of the statute than any court could reasonably countenance. For one thing, the Amendment states explicitly that "[n]o court of the United States" may directly or indirectly order busing beyond the limits that it declares to be reasonable.[67] Moreover, it is posited as a limitation of the All Writs Act,[68] which authorizes the Supreme Court and all courts established by an Act of Congress to issue "all writs necessary or appropriate in aid of their respective jurisdictions . . . ." Finally, Senator Johnston has stated on a number of occasions that the legislation is intended to apply equally to the inferior federal courts and to the Supreme Court.[69]

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[66] The Department of Justice devoted a significant portion of its July 1982 statement before a House Judiciary Subcommittee to explaining its restrictive view of the Johnston Amendment. The Department argued that the Amendment does not apply to the Supreme Court because the bill recites that it is enacted pursuant to article III, section 1 of the Constitution, which concerns the lower federal courts, and not the Supreme Court. *See* Olson, *supra* note 21, at 11-20. However, the Department ignores the fact that the Amendment also recites that it is enacted pursuant to section 5 of the fourteenth amendment -- which makes no such distinction. Indeed, Senator Johnston stated on the day it passed the Senate that section 5 of the fourteenth amendment was the principal authority for the legislation, and that the inclusion of article III, section 1, was "almost an afterthought." 128 Cong. Rec. S1323 (daily ed. March 2, 1982). Moreover, while the Justice Department quotes Senator Johnston as thanking Senator Hatch for his views suggesting a narrower construction of the Amendment, Senator Johnston in no way indicated he accepted Senator Hatch's views.

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[67] The First Judiciary Act, 28 U.S.C. § 451 (as amended), defines a "court of the United States" to include both the Supreme Court and the lower federal courts.

[68] 28 U.S.C. § 1651(a) (1966).

[69] For example, Senator Johnston stated during the Senate debate:

> So what we have done on this amendment, this compromise amendment, which is broadly supported in this Senate, would be to establish reasonable limits to tell the Supreme Court that what they have done has not worked but that the remedies still left and provided for in this amendment are likely to work. And we believe, Mr. President, that that would be appropriate under the Constitution to do so.
>
> As I mentioned, there are other legal scholars, Mr. President, who believe that Congress, under section 5 of the Fourteenth Amendment, has the power completely to prohibit busing and further that Congress under Article III of the Constitution has the power to withdraw jurisdiction from the lower federal courts and from the Supreme Court itself in ordering that busing.

1982 School Desegregation Hearings, supra note 1 (statement of Senator Johnston, at 11-12) (June 17, 1982).

Nonetheless, even if the Amendment could be fairly construed to apply only to the lower federal courts, it would still be constitutionally deficient. While most scholars have concluded that the "ordain and establish" language of article III indicates that Congress has broad discretion to establish, alter, and even eliminate the jurisdiction of lower federal courts, its power is not absolute. As is true of Congress' power over Supreme Court jurisdiction, the Constitution itself restricts that power.[70/]

First, article III itself is a constraint, in that Congress may not establish lower federal courts that are merely advisory bodies -- for example, by according the courts jurisdiction over a class of cases without according them the power to require necessary remedies. Thus, Robert Meserve, past President of the American Bar Association, has concluded that in cases in which a particular remedy is deemed constitutionally necessary,

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[70/] In Williams v. Rhodes, 393 U.S. 23, 29 (1968), the Supreme Court expressed this precept as follows:

> [T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.

Congress cannot deny a federal court authority to order that remedy while leaving it jurisdiction to hear the case.[71]

Moreover, as already discussed with respect to Supreme Court appellate jurisdiction, Congress may not use its article III power in a manner that denies rights secured under other sections of the Constitution.[72] In particular, congressional power to regulate the jurisdiction of the federal courts over cases involving constitutional rights may not be exercised in a manner that violates the Equal Protection Clause.[73] For

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[71] Meserve, Limiting Jurisdiction and Remedies of Federal Courts, 168 A.B.A.J. 159, 160 (1982). Professor Sager, while conceding that "our legal tradition cedes to Congress considerable discretion in selecting among remedial mechanisms," also has concluded that where "constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it has set itself against the Constitution." Sager, The Supreme Court, 1980 Term, 95 Harv. L. Rev. 17, 88 (1981).

[72] Proponents of the Johnston Amendment also look to a number of cases that have upheld certain legislative enactments limiting federal court authority. Most often relied on is Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938), which upheld the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 et seq., section 7 of which bars any federal court from issuing an injunction in a case involving a labor dispute unless a hearing is held, and certain factual findings are made. However, Lauf is inapposite to the Johnston Amendment. All the Norris-LaGuardia Act did was deprive the courts of the power to grant a remedy historically viewed as extraordinary; the remedy ordinarily available was not affected. Neither section 7 nor any other limitation of the Norris-LaGuardia Act either restricts the authority of the federal courts to grant necessary remedies under the Constitution, or directs a specified result by limiting the available remedies. In contrast, the Johnston Amendment does both, and, accordingly, violates the rule announced in Klein that removal of federal jurisdiction may not be used as a subterfuge to dictate the outcome of cases.

The Tax Injunction Act, 26 U.S.C. § 7421(a), also is cited occasionally as authority for the Johnston Amendment. It provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and was upheld by the Supreme Court in Snyder v. Marks, 109 U.S. 189 (1883). But, once again, the Tax Injunction Act does not deprive the federal courts of their authority to enforce the Constitution. They retain full jurisdiction to hear any constitutional challenge in suits to

(Footnote continued)

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recover taxes after collection.

The Emergency Price Control Act, 56 Stat. 23 (1942), is another statute sometimes cited for support of broad congressional power over federal court jurisdiction. In that statute, Congress gave exclusive jurisdiction to enjoin enforcement of price orders to the Emergency Court of Appeals. But this power was subject to Supreme Court review; therefore, all constitutional claims remained reviewable. *See Yakus v. United States*, 321 U.S. 414, 434 (1944). Moreover, even this minimal restructuring of federal jurisdiction may have been upheld only because Congress confronted a war-time economic emergency. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

Interestingly, the anti-injunction provision of 28 U.S.C. § 2283, which bars federal courts from issuing injunctions to stay state court proceedings, is inapplicable where a "uniquely federal right or remedy" is involved. *Mitchum v. Foster*, 407 U.S. 225, 237 (1972). Further, the Portal-to-Portal Act, 29 U.S.C. §§ 251-262, which prohibits federal court enforcement of certain retroactive wage claims under the Fair Labor Standards Act, was sustained only because no constitutional right was found to be at issue. *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[73] The Supreme Court has found that in some circumstances, individuals' constitutional rights cannot be protected except through the federal courts. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Fenner v. Boykin*, 271 U.S. 240 (1926). In this regard, the U.S. Commission on Civil Rights offered the following views on the Johnston Amendment's reliance on the states to vindicate equal protection rights:

> To leave the enforcement of the 14th Amendment guarantee entirely in the hands of State courts and local authorities is to ignore the history, meaning and purpose of the 14th amendment. Had the States adequately protected individual rights there would have been no need for the 14th Amendment.

Letter from Arthur Flemming, Chairman, U.S. Commission on Civil Rights, to Senator Lowell Weicker, at 10 (July 6, 1981)
(Footnote continued)

example, a statute providing that all constitutional claims raised by blacks must be heard in state courts, while the constitutional claims of whites are adjudicated in federal courts, undoubtedly would be unconstitutional as a racial classification violative of the equal protection guarantees of the fifth amendment.[74]

Similarly, a statute making no mention of race, but withdrawing jurisdiction over constitutional provisions principally intended for the protection of racial minorities also would be unconstitutional as an "implicit racial classification" violative of equal protection guarantees. For example, in Hunter v. Erickson,[75] the Court held that a city charter amendment subjecting anti-discrimination housing ordinances to approval procedures to which other housing matters were not subjected was a prohibited racial classification. "The reality," the Court said, "is that the law's impact falls on the minority," and that the effect of its enactment was to make it substantially more

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(analyzing legal and policy issues raised by the Johnston Amendment) (available from the U.S. Commission on Civil Rights).

Finally, some scholars have argued that Congress' power over the lower federal courts is constrained by the proliferation of federal law, which virtually has made the lower federal courts a necessity. See, e.g., Eisenberg, Congressional Authority to Restrict Lower Federal Courts Jurisdiction, 83 Yale L.J. 498 (1974).

74/ See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954).

75/ 393 U.S. 385 (1969).

difficult for minorities than non-minorities to achieve their goals through the legal process.[76]

It is extremely unlikely that the Johnston Amendment can stand up against these considerations. The bill's proponents and the Justice Department argue that it can -- insisting that it is not a racial classification, either explicitly or implicitly. They argue that the interests of litigants in desegregation achieved through busing are not divided along racial lines, but by a racially neutral disposition in favor of or against neighborhood schools.[77] However, when the Department made this argument in the Supreme Court last term in Washington v. Seattle School District No. 1,[78] it was flatly rejected.

In Seattle School District, the Court declared that Seattle's implementation of a statewide initiative terminating the use of mandatory busing for purposes of racial integration was unconstitutional. Although the Court conceded that the proponents of mandatory integration could not be classified by race, and that "white as well as Negro children benefit from ethnic and racial diversity in the classroom", it found that:

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[76] Id. at 391.

[77] The Justice Department also has argued that the Johnston Amendment prohibits it from seeking, and the federal courts from issuing, any order requiring the transportation of students "for any reason," not just for desegregation, beyond the limits established in the Amendment. 1982 School Desegregation Hearings, supra note 1 (letter from Attorney General William French Smith to the Hon. Peter W. Rodino, Chairman, House Judiciary Comm., at 15) (May 6, 1982). But the language of the Amendment does not support such a reading. The Amendment specifically exempts busing for special education -- the only other context in which the courts deal with the busing of public school students -- thus singling out the interests of minorities in desegregated education for restrictive treatment.

[78] 102 S. Ct. 3187 (June 29, 1982).

> [N]either of these factors serves to distinguish Hunter, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. [citations omitted] In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose.[79]

The Court concluded that the initiative was unconstitutional because it established an impermissible racial classification in violation of the Equal Protection Clause of the fourteenth amendment. The initiative could not be enforced, the Court declared, "because it does not 'attempt to allocate governmental power on the basis of any general principle . . ..' Instead it uses the racial nature of an issue to define the governmental decision-making structure, and thus imposes substantial and unique burdens on racial minorities."[80]

This reasoning strongly suggests that the Johnston Amendment is unconstitutional on yet another equal protection ground: it would accord some constitutional claimants preferred status over others. It would allow some the choice of either federal or state forums, while relegating others to state courts alone. Thus, it would treat people differently on the basis of the constitutional interest they seek to protect, and, hence, indirectly according to their race.[81] As in *Hunter*, "the evil condemned . . . [is] the comparative structural burden placed on the political achievement of minority interest."[82]

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[79] Id. at 3196 (citation omitted).

[80] Id. at 3195. See also Lee v. Nyquist, 318 F. Supp. 710, 719 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971) (public school student assignment statute was struck down because it "treat[ed] educational matters involving racial criteria differently from other educational matters and [made] it more difficult to deal with racial imbalance in the public schools").

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[81] The Department of Justice argues that *Seattle School District* was not decided on *Hunter v. Erickson* grounds -- grounds it dismisses as "complex and esoteric." Olson, *supra* note 21, at 42. However, the Court's opinion repeatedly and explicitly states its primary reliance on *Hunter*. *See* 102 S. Ct. at 3193, 3194, 3195, 3196, 3197, 3198. Moreover, the Department also misconstrues the central holding in *Seattle School District*. It asserts that the case turns on the finding that "political mechanisms [were] modified to place effective decision-making authority at a different level of government," and thus attempts to distinguish the Johnston Amendment. *Olson*, *supra* note 21, at 42. However, the Court could not have been clearer when it stated that "[t]he single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible burdens on minority interests." 102 S. Ct. at 3198 n.18.

Moreover, the Department's discussion of *Crawford v. Los Angeles Board of Education*, 102 S. Ct. 3211 (June 29, 1982), in which the Supreme Court upheld the repeal of a voluntary state racial balance policy, does nothing to advance its argument. Relying on *Crawford*, the Department asserts that "[a] neighborhood school policy does not offend the Equal Protection Clause." Olson, *supra* note 21, at 41, *paraphrasing* *Crawford*, *supra*, at 3218 n.15. However, this reliance depends on a deliberate misreading of *Crawford*: the Supreme Court actually said, "A neighborhood school policy does not offend the Fourteenth Amendment *in itself*." 50 U.S.L.W. at 3218 n.15 (emphasis added). Also, in its next sentence, the Court observed that there can be no offense to the fourteenth amendment "*[a]bsent a constitutional violation*," which it did not find in *Crawford*. *Id.* (emphasis added).

[82] *See* *Seattle School District*, 102 S. Ct. at 3197 n.17. *See also* *Lindsey v. Normet*, 405 U.S. 56 (1972); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Indeed, Professor Lawrence Tribe of Harvard University Law School, relying in addition on *Griffin v. Illinois*, 351 U.S. 12 (1956), *Douglas v. California*, 372 U.S. 353 (1963), *Boddie v. Connecticut*, 401

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Finally, in practical terms, even if there were a theoretical possibility of Supreme Court review of state court judgments, the Supreme Court's workload would preclude it from hearing more than a small fraction of the cases brought before it. Thus, elimination of access to lower federal courts necessarily means that the vast majority of litigants with claims affected by the Johnston Amendment would be denied access to any federal forum.

Availability of State Court Review -- Proponents of the Johnston Amendment contend that so long as constitutional rights can be enforced in the state courts, the bill's constitutional infirmities evaporate. However, as the preceding discussion indicates, the constitutional defects of the Johnston Amendment cannot be thus cured. Moreover, further scrutiny shows that even the availability of a state court hearing may be illusory.

First, any defendant in a state court action arising under the federal Constitution may remove that case to federal court.[83] And, if the federal courts could not grant full and effective relief -- which would be the case if the Johnston Amendment were enacted -- defendants could use removal to preclude the issuance of an effective remedy. As Professor Sager concluded in a review of just this question, "[A]s a practical matter . . . when Congress denies the federal courts

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U.S. 371 (1971), and NAACP v. Button, 371 U.S. 415 (1963), contends that there may be a "fundamental right to equal litigation opportunity" protected by the Equal Protection Clause. Tribe, American Constitutional Law 1008-10 (Mineola, New York: The Foundation Press, Inc., 1978).

[83] 28 U.S.C. § 1441 (1973).

power to grant a crucial remedy for constitutional wrong doing it denies that remedy entirely."[84]

Moreover, because the Johnston Amendment is unambiguously directed at changing the prevailing interpretation of the Constitution, and because it restricts only federal court jurisdiction, its sponsors plainly are inviting state court judges to disregard established constitutional law and thus dishonor their oaths to obey the United States Constitution.[85] The ABA has expressed the conviction that this is indeed the ulterior purpose of the Johnston Amendment:

> It betrays a great cynicism about our state judicial systems for it is based on the belief that variations that are pleasing to current local majorities will be read into our national organic documents by local courts . . . . and risks our converting America into a kind of league of independent states instead of one nation.[86]

Under these circumstances, it is reasonable to anticipate that state court judges, who are not protected by the federal Constitution's guarantees of tenure and compensation, and who may face periodic, popular elections, would be subjected to substantial political pressure to disregard established law.[87/] Thus, the Johnston Amendment poses a substantial threat to the integrity of the state courts, as well as to the prospect of disinterested interpretations of the Constitution. As Professor Sager concluded, "[U]se of the state courts as the exclusive forums for article III business is . . . inconsistent with the constitutional commitment to a radically independent federal judiciary."[88/]

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[84] Sager, supra note 71, at 86.

[85] These oaths are required by the Supremacy Clause, U.S. Const. art. VI, cl. 2.

[86] Brink, supra note 9, at 16.

Finally, the Johnston Amendment could result in conflicting state court decisions defining fourteenth amendment rights as different state supreme courts come to different conclusions, while the U.S. Supreme Court remains powerless to

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[87/] Chief Justice Marshall wrote for the court in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 386-87 (1821):

> It would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . ..

[88/] Sager, supra note 71, at 64-65.

exercise its appellate jurisdiction to establish uniformity.[89] Here it is worth recalling Justice Holmes' often-quoted warning:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.[90]

For these and other reasons, the Conference of Chief Justices of the various states recently resolved unanimously that bills such as the Johnston amendment are a "hazardous experiment with the vulnerable fabric of the nation's judicial system."[91]

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[89] Even if the Johnston Amendment were read not to apply to the Supreme Court, the bill still would deny plaintiffs the right to choose an original forum having the independence the Constitution confers on article III courts. *Cf*. *Northern Pipeline Construction Co.*, *supra* note 46.

[90] Holmes, *Collected Legal Papers* 295-96 (New York, N.Y.: Harcourt, Brace & Howe, 1920). The Supreme Court declared in *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 350 (1856) that:

> [O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all the States, to the interpretation of the Constitution and the legislation of Congress; with powers also to declare judicially what Acts of the Legislatures of the States might be in conflict with either.

This echoes the views of the Framers. As Hamilton said in *The Federalist No. 80*: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." *The Federalist No. 80*, at 495 (A. Hamilton) (J. Madison ed.) (Washington, D.C.: J. Gideon, Jr., 1818).

B. Policy Implications of the Johnston Amendment

Beyond the Johnston Amendment's constitutional failings, scholars have emphasized that it and similar bills that restrict federal jurisdiction, or eliminate essential remedies in selected constitutional cases, are profoundly unwise -- indeed that they threaten our fundamental constitutional heritage and system of government.

For one thing, the Johnston Amendment sets a dangerous precedent. One-issue groups who disagree with Supreme Court decisions will be encouraged to eschew the constitutional amendment process, and work their will through Congress.[92] This precedent, of course, would not be limited to the dilution of constitutional protections afforded civil liberties. A future Congress could restrict jurisdiction or remedies with respect to the fifth amendment's provisions protecting private property as easily as today's Congress can restrict them with respect to the fourteenth amendment's provisions guaranteeing the equal protection of the laws.[93]

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[91] Resolution I, Resolution of the Conference of Chief Justices Relating to Proposed Legislation to Restrict the Jurisdiction of the Federal Courts (adopted at Williamsburg, Va.) (January 30, 1982).

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[92] In 1937, the Senate Judiciary Committee rejected the Roosevelt court-packing plan, declaring:

> Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen against the Government itself, create the vicious precedent which must necessarily undermine our system?
>
> * * *
>
> Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent court, a fearless court, a court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or fractional passion, approves any measure we may enact. We are not the judge of the judges. We are not above the Constitution. . . . Exhibiting this restraint, thus demonstrating faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands.

S. Rep. No. 711, 75th Cong., 1st Sess. 13-14 (1937).

[93] In testimony before the House Subcommittee on Courts, Civil
(Footnote continued)

In addition, if this Congress can rewrite essential elements of the Constitution by a simple majority vote, a future Congress could use the same process to eliminate federal jurisdiction or remedies in all cases arising under the Constitution. We then would be left only with the protection of the state courts. And then, as the ABA has warned:

> [I]f state legislatures followed the example of Congress and deprived state courts of constitutional jurisdiction, we would have no judicial review at all in constitutional cases. We would have a purely parliamentary system of government, without either an enforceable written national Constitution or a court having the power to declare the process unconstitutional. The founders of our country clearly did not intend to create a tripartite

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Liberties, and the Administration of Justice, the ABA took the position that:

> If the process attempted in [the Johnston Amendment] and the other bills were valid, it could be used by this or a future, differently minded Congress, to deny our citizens freedom of speech, press, assembly, exercise of religion or any, or all, of the many other rights protected by the federal courts under the Constitution. Both the amendment process and the role of the federal courts in constitutional cases could become a nullity, leaving us with either 50 different federal constitutions -- one for each state -- or a purely parliamentary form of government. Our forefathers would not have created three branches of government or provided an intentionally complex means of constitutional amendment had they at the same time intended to cancel those clauses by authorizing an unrestricted reading and use of Article III. Their descendants would not have amended the Constitution by the Bill of Rights or the post-Civil War amendments, had they intended to make those great guarantees revocable by simple act of Congress, without consulting the states that adopted those Amendments.

Brink, _supra_ note 9, at 4-5.

> system of federal government that so easily could be rendered a nullity.[94]

In such a system, the roles of the Court and Congress would become so enmeshed in the public perception that the people would hold Congress responsible for disfavored Court opinions whenever Congress did not restrain the Court. And the emergence of varying standards among the states for the protection of constitutional rights could create widespread disillusionment with our entire legal system.

Finally, the Congress should be mindful, as it considers attempts to weaken the role of the judiciary in the equation that safeguards each branch of the government from encroachment by another, that its efforts ultimately may redound to its own disadvantage. It has not been so long since the federal courts turned back presidential efforts to infringe upon the powers of Congress by taking over steel mills, impounding appropriated funds, and resisting congressional subpoenas.[95] To distort our system of checks and balances to address particular issues, however troublesome, would be a dangerous and radical precedent.

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[94] Id.

[95] Nor can the Court's impartiality as a champion of the principle of separation of powers be doubted. It also has stemmed the tide of transitory congressional passions that sought to nullify the constitutional prerogatives of the Executive. See, e.g., Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1869).

C. Constitutionality of the Helms Amendment

The Helms Amendment would prohibit the Justice Department from bringing or maintaining an action directly or indirectly to require transportation of students to schools other than those nearest their homes.[96/] The precise extent of the Amendment's limitation on the Justice Department is unclear. One reading would prevent the Department from becoming involved in *any* school desegregation case on the theory that it could lead directly or indirectly to busing. A narrower reading, favored by the Department, would prevent it from seeking busing as a remedy, but would not bar it from participating in desegregation suits. Unfortunately, the legislative history is inconclusive on this potentially critical point of interpretation.[97/]

Whichever way it is read, however, the Helms Amendment raises constitutional difficulties. Its supporters argue that since Congress conferred the authority to bring school desegregation suits on the Department,[98/] Congress has the power to

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[96/] For a full statement of the Helms Amendment, *see supra*, p. 7.

[97/] Dale, Legal Analysis of the Helms Amendment No. 96 to S. 951, the Department of Justice Authorization Act, Regarding the Enforcement Authority of the Department in School Desegregation Cases 4-7 (August 31, 1981) (available from the American Law Division, Congressional Research Service, U.S. Library of Congress).

[98/] Civil Rights Act of 1964 § 601, 42 U.S.C. §§ 2000d *et seq.* (as amended).

withdraw it.[99] The issue cannot be so facilely resolved, however. First, the Helms Amendment appears to violate separation of powers principles. Just as the Johnston Amendment must be judged against the principles separating legislative and judicial power, the Helms Amendment must be judged against those separating the Congress from the Executive.

Article II of the Constitution provides that "the executive Power shall be vested in a President of the United States," and entrusts the executive with "Care that the Laws be faithfully executed." In Buckley v. Valeo, [100] the Supreme Court confirmed that those provisions commit to the Executive the duty to execute the law:

> A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'[101]

The Court then went on to state its view of the proper role of the executive in federal court litigation:

> Whether tested . . . by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned,

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[99] Contrary to the implication of this assertion, the Department of Justice is not entirely dependent on the Civil Rights Act of 1964 for its authority to participate in school desegregation cases. For example, in 1954, in the absence of explicit statutory authority, the Solicitor General, as a friend of the court in the Brown case, forcefully argued for the invalidation of state laws mandating segregation in public education.

[100] 424 U.S. 1 (1976)

[101] Id. at 138.

> are subject to the direction, and within the control of, the Attorney-General.[102]

Yet the Helms Amendment would turn these principles on their heads and place constitutional litigation conducted by the Justice Department under the direction of the Congress.

Former Attorney General Benjamin Civiletti has argued that the Helms Amendment would frustrate the ability of the Justice Department to seek effective relief in school desegregation cases. He concluded it was not only inconsistent with Title VI of the Civil Rights Act of 1964, but also that it directly impinged on the constitutional functions of the Executive.[103] Similarly, a report by the Committee on Civil Rights of the Association of the Bar of the City of New York concluded that the "Constitution simply does not give Congress" the authority to so limit the Justice Department.[104]

A second constitutional deficiency of the Helms Amendment is one that also was identified in connection with the Johnston provision: the Amendment imposes unequal burdens on those seeking to protect the interests of minorities. The Helms restrictions, of course, would apply only in cases brought to remedy unconstitutionally segregated school systems. The Justice

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[102] 424 U.S. at 139, quoting Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1869).

[103] 1982 School Desegregation Hearings, supra note 1 (statement of Benjamin Civiletti, at 3) (July 15, 1982).

[104] Committee on Civil Rights, Proposed Legislation to Limit the Authority of the Department of Justice to Recommend Busing as a Remedy in School Desegregation Cases, 37 Rec. A.B. City N.Y. 44, 52 (1982)

Department would not be similarly restricted in other areas. Because busing often is the only constitutionally sufficient remedy in such cases, and because the Justice Department would be precluded from assisting in achieving such a remedy, the limitations on the Justice Department plainly would impose "special burdens on racial minorities within the governmental process."[105] Accordingly, the Helms Amendment would violate the neutrality principle of Hunter v. Erickson.[106]

The Helms Amendment also runs afoul of the principle announced in Cooper v. Aaron. The federal government is constitutionally prohibited from financially supporting segregated schools. As the Court held in Cooper:

> State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and

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[105] See Hunter v. Erickson, 393 U.S. 385, 391 (1969).

[106] Id.

> pervasive that it is embraced in the concept of due process of law.[107]

In this context, the Helms Amendment must be evaluated with regard to other federal legislation dealing with federal funds for education. Through grant-in-aid programs enacted by Congress, the federal government provides substantial assistance to public education. In Title VI of the Civil Rights Act of 1964,[108] Congress made all federal departments and agencies responsible for assuring nondiscrimination in the use of federal funds, and authorized the withholding of funds from recipients that persist in discrimination.

However, in 1976 Congress passed the Byrd Amendment,[109] which restricts the authority of federal agencies to withhold funds from public school systems that engage in discrimination, where the remedy for that discrimination would require busing students to schools other than those nearest their homes. Two years later, it enacted the Eagleton-Biden Amendment[110] which tightened the restrictions of the Byrd Amendment on the Department of Education's authority to enforce school district compliance with Title VI of the 1964 Civil Rights Act by administrative action. That Amendment, which Congress has readopted annually, forbids busing students to carry out a desegregation plan involving grade restructuring, pairing, or clustering.[111]

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[107] 358 U.S. 1, 19 (1958) (citation omitted). The proscription in *Cooper* binds the federal government as it does the states. In a variety of contexts, courts have ruled that continued federal aid to racially discriminatory programs at the state or local level violates the Due Process Clause of the fifth amendment. *See, e.g.*, *Kelsey v. Weinberger* 498 F.2d 701 (D.C. Cir. 1974) (federal school aid disallowed where school district had not remedied racially discriminatory teacher assignments); *Adams v. Richardson* 480 F.2d 1159 (D.C. Cir. 1973) (Justice Department must enforce provisons of Civil Rights Act against school system receiving federal funds); *Gautreaux v. Romney* 448 F.2d 731 (7th Cir. 1971) (knowing participating of Department of Housing and Urban Development in racially integrated development project violated Due Process Clause). Indeed, Congress has codified this principle in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (as amended).

[108] Civil Rights Act of 1964 § 601, 42 U.S.C. §§ 2000d *et seq*. (as amended).

[109] Section 209, P.L. 94-206 (1976), *amending* 42 U.S.C. § 2000d (as amended).

Although the Byrd and Eagleton-Biden Amendments successfully restricted civil rights enforcement through administrative action and funding cut-offs, the Justice Department remained free to enforce the constitutional right of minority children to desegregated schools. Congress' next move, however, was to restrict that freedom, and, in 1980, it passed a limitation on the Department's enforcement authority that closely paralleled

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110/ 20 U.S.C. §§ 1228, 1652 (1978).

111/ The Eagleton-Biden Amendment was enacted because the Attorney General and the Secretary of Health, Education and Welfare ("HEW") construed the Byrd Amendment to permit HEW to reject remedial plans not involving "pairing" or "cluster schools." ("Pairing" treats two schools as one unit, with some grade levels housed exclusively in one school and the rest housed in the other. Similar grade or program restructuring takes place among more than two schools through "clustering".) A remedial plan using these strategies effectively could change the location of the school "nearest" the student's home, and, as a result, busing could be required to take students beyond the schools physically nearest their homes if those schools did not offer instruction at the appropriate grade level. Supporters of the Byrd Amendment claimed that the HEW-Justice interpretation, which permitted HEW to require limited busing, circumvented congressional intent.

the current Helms Amendment.[112] That bill was vetoed by President Jimmy Carter on December 4, 1980.[113] In a message to Congress, the President explained that he viewed the bill as an unprecedented encroachment upon the authority of the Executive Branch and its responsibility to enforce the Constitution and laws of the United States:

> If a President can be barred from going to the courts on this issue, a future Congress could by the same reasoning prevent a president from asking the courts to rule on the constitutionality of other matters upon which the President and the Congress disagree. For any President to accept this precedent would permit a serious encroachment on the powers of this office.[114]

President Carter's belief that the 1980 bill would have effected an unconstitutional restraint on the Executive was confirmed when the Byrd and Eagleton-Biden restrictions were challenged in Brown v. Califano.[115] While the court of appeals upheld the legislative restrictions on the Department of Education, it did so in express reliance on a factual finding that Congress intended that school desegregation cases be channeled to the Justice Department. In fact, its decision was premised on the assumption that the Justice Department would act quickly to enforce constitutional rights in those cases where federal funds were going to school districts maintaining unlawfully segregated systems. As a corollary, the court found that if the Justice Department was unable or unwilling to enforce the law, the Byrd and Eagleton-Biden Amendments could be unconstitutional as applied.[116] However, the Helms Amendment is intended to put the Justice Department in just that position, that is, to prevent it from assuming the role the court found critical in Brown v. Califano. Thus, it would interfere with, if not block, the constitutional responsibility of the Executive.

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[112] Efforts to limit the enforcement authority of the Department of Justice were well underway before the successful 1980 legislation. On October 14, 1978, the original Collins Amendment, which proposed limitations substantively identical to the Helms Amendment, was adopted by the House as a rider to the Department of Justice appropriations bill for fiscal year 1979. It was eliminated in conference. See Conf. Rep. No. 1777, 95th Cong., 1st Sess. (1978), 124 Cong. Rec. H7403 (daily ed. July 26, 1978). A similar measure, which would have prohibited the Department from participating in legal actions that promoted busing as a means of desegregation, also had been urged unsuccessfully by Senator Dole as an amendment to the fiscal 1977 Justice Department Appropriations bill. See Amend. No. 1942, 95th Cong., 1st Sess., 122 Cong. Rec. 20194 (1976).

[113] 126 Cong. Rec. D1596 (daily ed. Dec. 30, 1980).

[114] 127 Cong. Rec. S6284-85 (daily ed. June 16, 1981).

The Justice Department argues that it still could fulfill its constitutional obligations because:

> [The Helms Amendment] would not appear to disable [it] from seeking a court order foreclosing the receipt of federal funding by schools in unconstitutionally segregated school systems in those cases, if any, where the court was prevented by the limits contained in the Neighborhood School Act from issuing an adequate remedy and the

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[115] 627 F.2d 1221 (D.C. Cir. 1980)

[116] Id. at 1230-37.

> administrative agency was precluded from terminating federal funds.[117]

A plain reading of the Helms Amendment suggests otherwise, however.[118] It states that:

> No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student . . ..(emphasis added)

A suit by the Justice Department to terminate funding to a school district that refused to initiate busing to remedy unconstitutional segregation arguably is a "sort of action" to "require . . . indirectly" the transportation of students. And if a court so found, the Helms Amendment -- insofar as it would require the continuation of federal subsidies to unconstitutionally segregated school systems where busing is the only adequate remedy -- would be unconstitutional.

Finally, the Helms Amendment raises a set of policy considerations separate from those raised by the Johnston Amendment, and separate from the constitutional considerations pertaining to either. Among them are the precedent that the

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[117] 1982 School Desegregation Hearings, supra note 1 (letter from Attorney General William French Smith to Hon. Peter W. Rodino, Chairman, House Judiciary Comm., at 14) (May 6, 1982).

[118] The Justice Department has cited no legislative history in support of its interpretation of the Helms Amendment. Moreover, it cannot be argued reasonably that Congress would attempt to preclude federal intervention in cases that might result in desegregation plans involving court-ordered busing, but would leave untouched the Department's power to coerce local school boards into adopting such remedies "voluntarily" by threatening them with a loss of federal funds.

Helms Amendment creates for restricting the authority of the Executive to enforce constitutional rights; the fact that it removes the Justice Department from most school desegregation cases, leaving the courts with only two poles of opinion -- the civil rights plaintiffs and the defendant school systems;[119] and the fact that the Amendment places the entire financial burden of litigation necessary to break-up unconstitutionally segregated school systems back on those least able to carry it: the young victims of school segregation and their parents.

In summary, if the Helms-Johnston Amendment is enacted and honored by the courts, it will shift the delicate balance of power among the three branches of our government to the great detriment of the judicial branch and, with the same stroke, demean the Constitution to the status of ordinary legislation. If the Amendment succeeds in Congress and is struck down by the courts, as it manifestly should and probably would be, the Congress still will have betrayed its constitutional oath and triggered a confrontation that will send a clear signal to the judiciary to hedge and trim its decisions in controversial cases in order to avoid a popular outcry that could precipitate further legislative remonstrations.[120] As former Senator Jacob Javits of New York pleaded in like circumstances, it is "the function of governance to avoid dreadful confrontations."[121] Assuredly, Congress has mounted a serious assault on the courts, but that is only part of the story, for Congress increasingly appears to have a powerful ally in the Department of Justice.[122]

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[119] Indeed, the Leadership Conference on Civil Rights contends that the Helms Amendment works a virtual repeal of the 1964 Civil Rights provisions "declaring support for the Supreme Court's decision in Brown v. Board of Education and authorizing the Executive branch to aid in the enforcement of the constitutional right to nondiscrimination in public education." *See* 127 Cong. Rec. S6513 (daily ed. June 18, 1981).

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[120] One can easily imagine that the very pendency of this proposal would encourage local school boards to retreat from integration. Paul Masem, former Superintendent of Schools of Little Rock, Arkansas, where, 25 years ago, there was a major confrontation between federal and state officials over school integration, was interviewed about a federal appeals court ruling clearing the way to implement a desegregation plan that will leave 1,500 black children isolated in four nearly all-black elementary schools. Masem was reported as saying he was convinced that the Reagan Administration's decision to oppose busing in school desegregation cases had given school boards a signal to retreat from integration efforts. Wash. Post, Aug. 18, 1982, at A 3, col. 4.

[121] 110 Cong. Rec. 22092 (daily ed. Sept. 15, 1964).

[122] If the Johnston Amendment becomes law, the Department of Justice will have aided in its own evisceration, since the companion measure, the Helms Amendment, would weaken seriously the Department's own power, and, therefore, the power of the Executive Branch. The same members of Congress who believe they can limit the power of the judiciary with impunity also believe their power extends to the Executive. For example, Senator East commented during hearings on court-ordered school busing, "We can emasculate the Executive Branch overnight if we choose to, under the Constitution; we can emasculate the judiciary . . . we have the power." Senate Hearings, supra note 1, at 267.

II. THE JUSTICE DEPARTMENT'S VIEW OF THE JUDICIAL FUNCTION

The Constitution charges the President with the care that the laws of this country be faithfully executed,[123] and the Attorney General is his principal instrument in the discharge of that duty. He is the chief law enforcement officer of the United States. However, unlike Congress, the Attorney General cannot make the law, and, unlike the Supreme Court, he is not the final interpreter of the law.

Recent actions of the Administration have called into question its commitment to the institutional role of the Attorney General as it has emerged from two centuries of historical development and constitutional doctrine. At a time when some members of Congress would like to see the judiciary be more responsive to popular sentiment,[124] Attorney General William French Smith also is warning the courts to heed "the groundswell of conservatism evidenced by the 1980 election."[125] One example of the implications of the Attorney General's thesis for constitutional adjudication is manifest in his pledge to resist any increase in the number of "suspect" legislative classifications,[126] such as race, which, when present, often result in the Court's overturning legislative determinations.[127]

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[123] U.S. Const. art. II, § 3.

[124] During 1981 hearings on court-ordered busing, Senator East commented that the judiciary had "gone too far," a circumstance he attributed to its regrettable insulation from political pressures. East said:

> But you see, it [a federal judgeship] is a lifetime appointment, and it is not necessary to go out and ultimately be accountable in the political arena. That is the fundamental problem that people in the legislative branches face -- that there must be some degree of responsiveness to public sentiment on that, or willingness at least to get out and grapple with it.

Senate Hearings, supra note 1, at 520.

The Justice Department already has begun to follow through on the Attorney General's theme. First, of course, it is assisting Congress in its attack on the jurisdiction of the judiciary by actively supporting the Helms-Johnston Amendment. In addition, in cases now pending before the federal courts, it has taken the extraordinary position that special deference should be paid to legislative and popular opinion in cases in which controversial issues are involved. This position has been characterized as a "radical vision"[128] in that it is contrary to decades of constitutional law and doctrine that declare "the federal judiciary [to be] supreme in the exposition of the law of the Constitution."[129]

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[125] Smith, Federal Courts Have Gone Beyond Their Abilities, 21(1) Judges' J. 4, 5, Winter, 1982.

[126] "Suspect" legislative classifications are those such as race which judicial precedent has demonstrated to be frequently linked to unconstitutional discrimination. Once a classification is declared to be suspect, any legislation that has a disparate effect according to that classification is subject to a special, higher standard of review to determine its constitutionality. *See, e.g.*, *Korematsu v. United Staes*, 323 U.S. 214, 216 (1944).

[127] *Smith*, *supra* note 125, at 6-7.

[128] Greenhouse, Abortion Brief Serves as a Roadmap, N.Y. Times, Aug. 10, 1982, at B 6, col. 4.

One example of this radical departure from traditional constitutional doctrine occurred in a pair of cases now pending before the Supreme Court as the result of appeals taken by the State of Missouri and the City of Akron from federal court decisions invalidating state and city abortion regulations on the grounds that they intruded on a woman's right to privacy as defined by the Court in *Roe v. Wade*.[130] In a brief filed with the Court on behalf of the United States as *amicus curiae*, the Solicitor General has urged the Court to vacate the judgments and remand the cases for reconsideration in light of the standard proposed in his brief. Specifically, he calls upon the Court to test the "constitutionality of legislation . . . by an appropriately deferential standard,"[131] and states that "in deciding which legislative policy choices are 'unduly burdensome' . . . the Court should accord heavy deference to the legislative judgment."[132] The Solicitor General did not assert that either Missouri's or Akron's laws were constitutional. Rather, he argued that the lower courts were wrong to decide the cases at all. Wrong, that is, to sit in judgment on the decisions of elected legislators on an issue such as abortion, where "peoples' views may differ mightily."[133]

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[129] *Cooper v. Aaron*, 358 U.S. 1 (1958).

[130] *See Akron Center for Reproductive Health, Inc. v. Akron*, 651 F.2d 1198 (6th Cir. 1981), *cert. granted*, *Akron v. Akron Center for Reproductive Health, Inc.*, 102 S. Ct. 2266 (May 24, 1982); *Planned Parenthood Assoc. v. Ashcroft*, 664 F.2d 687 (8th Cir. 1981), *cert. granted*, 102 S. Ct. 2267 (May 24, 1982).

[131] *See* Brief for *amicus curiae* the United States, at 3, *Akron Center for Reproductive Health*.

[132] *Id.* at 10.

The danger against which the Solicitor General would defend is the asserted tendency of courts to "constitutionalize" issues, thereby removing those issues from the realm of public debate and decision-making. He argues that the proper role of the courts is to articulate the constitutional interest at stake, and then to allow the legislatures to say as a matter of "policy" what that interest means. That is, the Solicitor General would allow the legislatures to define the bounds of the liberty or property identified by the courts, and to say how they should be enforced. To the extent that constitutional values are implicated, the Solicitor General expresses confidence that "those values were taken into account because legislators, like other public servants, take an oath to uphold the Constitution."[134]

The principal problem with this analysis is that it totally rejects the vital role of the judiciary in our constitutional system. It is the very essence of the judicial mission to guarantee zealously the promise contained in the Bill of Rights that political majorities will not be allowed to harness the power of the state to oppress unpopular views.[135] To be able to articulate a right but not to give it substance would consign the courts to a meaningless role. Moreover, for the courts to turn from controversial issues involving conflicts between individual liberties and the power of the government would be to ignore their constitutional obligations.

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[133] *Id*. at 12.

[134] *Id*. at 9 n.5.

The Justice Department's view of the deference courts should accord legislatures and popular majorities surfaced again in a brief filed with the Court of Appeals for the Fifth Circuit.[136] The Department asked the court for a delay in considering an appeal from a mandatory reassignment order imposed in East Baton Rouge, Louisiana, as a remedy for unconstitutional segregation. The purpose of the delay sought was to permit substitution of a voluntary plan.

The district court previously had ruled that over a period of many years, the East Baton Rouge Parish School Board had failed to dismantle its former dual school system. As a result, the court, citing a "failure of leadership, courage and wisdom on the part of local school officials,"[137] ordered the school board to implement the court's desegregation plan. Here again -- as in Akron Center for Reproductive Health -- the Justice Department did not dispute the existence of a constitutional violation. Nonetheless, it urged the appellate court not to approve the lower court's remedial order -- entered after years of litigation and extensive hearings -- so that the district court could conduct further hearings on the "efficacy" of its plan.[138]

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[135] See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[136] Brief for amicus curiae the United States, Davis v. East Baton Rouge Parish School Board, appeals docketed Nos. 80-3922 and 81-3476 (5th Cir. Nov. 17, 1980; Aug. 31, 1981) [hereinafter cited as East Baton Rouge].

[137] Davis v. East Baton Rouge Parish School Board, 514 F. Supp. 869, 871 (M. D. La. 1981).

One of the objections raised by the Department was that busing provoked "white flight" that led to resegregation.[139] This is an unprecedented argument for the Justice Department to make. For years the Department has contended, consistent with Supreme Court rulings, that community opposition is not a relevant consideration in the judicial effort to remedy unconstitutional segregation. The Department's position in East Baton Rouge is flatly inconsistent with those rulings, including Brown II, which warns that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[140]

The Justice Department's new position is particularly revealing in light of the Supreme Court's 1958 decision in Cooper v. Aaron.[141] In Cooper, the defendants asked the Court to postpone implementation of a court-approved desegregation program for Little Rock, Arkansas, because of extreme public hostility.[142] In an opinion captioned in an extraordinary fashion with the names of all nine Justices, the Court refused to grant any delay on the ground that "the constitutional rights of respondents are not to be sacrificed or yielded to . . . violence and disorder . . . ."[143] What violence and disorder could not defeat should not now be surrendered to the speculation of the Department of Justice and others that busing may cause "white flight" and resegregation, and, therefore, may not be a beneficial and "cost-effective" tool to remedy unconstitutional segregation.

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[138] Brief for amicus curiae the United States, at 18, East Baton Rouge.

[139] Motion by the United States to Stay Further Proceedings in the Court of Appeals, at 2, East Baton Rouge.

[140] 349 U.S. 294, 300 (1955).

[141] 358 U.S. 1 (1958).

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[142] Id. at 16. In East Baton Rouge, of course, the Justice Department did not ground its request for delay on the kind of public hostility that the Cooper Court refused to countenance. However, the Department's position that "white flight" -- actual or anticipated -- justifies rescinding a desegregation plan is different only in degree from that of the defendants in Cooper.

The Department's purpose in seeking delay in East Baton Rouge is to encourage rejection of the mandatory plan in favor of a system of "voluntary incentives." See Memorandum in Support of a Motion by the United States to Stay Further Proceedings in the Court of Appeals, at 2, East Baton Rouge. That position is in keeping with the policy the Administration announced before a House Judiciary Subcommittee in November, 1981:

> [W]e are not going to compel children who do not want to choose to have integrated education to have one.

School Desegregation: Hearings on School Desegregation Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess. 631 (1981) [hereinafter cited as School Desegregation Hearings] (statement of William Bradford Reynolds, Assistant Attorney General for Civil Rights).

The inefficacy of voluntary plans to end racially segregated school systems is discussed more fully infra at section III.

[143] Id.

III. THE HELMS-JOHNSTON AMENDMENT AS EDUCATION POLICY

The gist of the preceding discussion is that the Helms-Johnston Amendment is an attack on our constitutional system of government, to be opposed even if its sponsors are correct, and the Supreme Court is wrong, about the efficacy of busing as a method to remedy school segregation. In the words of Professor Bickel, "more destructive than the worst of busing [is] the attempt to work such a reallocation of powers between Congress and the Supreme Court."[143]

Our inquiry would not be complete, however, without also examining the fundamental assumption on which the Helms-Johnston Amendment rests -- that busing is a destructive and educationally deleterious remedy for unconstitutional school segregation. If that assumption is unfounded, as the overwhelming evidence shows it to be, Helms-Johnston is unsound education policy as well as unconstitutional legislation.[144] Thus, the danger it poses to our constitutional system is compounded by the threat of undoing and prohibiting desegregation plans that create equal educational opportunity in the nation's public schools.

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[143] Bickel, *supra* note 52.

In Brown II, the Supreme Court's first decision on school desegregation remedies, the Court recognized that appropriate plans might vary from system to system, and that district court judges, "[b]ecause of their proximity to local conditions," were in the best position to make initial decisions.[145] The Court added that district judges should be guided by equitable principles, which are "characterized by a practical flexibility . . . and by a facility for adjusting and reconciling public and private needs."[146]

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[144] In embarking on a review of the educational and other quantifiable benefits of school desegregation achieved through busing, it is important to keep in mind that the purpose of busing is to aid in the correction of a constitutional wrong -- to obliterate, "root and branch," all vestiges of unconstitutional school segregation; to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley, 418 U.S. 717, 746 (1974). Ironically, the importance of that objective -- righting a constitutional wrong -- is often lost in the dispute over community acceptance of busing, scholastic achievement, and other related issues.

One who has not lost sight of the reason children are bused is the Honorable James B. McMillan, the federal district court judge who heard the Swann case, and, ultimately, issued the order that ended unconstitutional segregation in the schools of Charlotte-Mecklenburg, North Carolina. Judge McMillan testified that it is the extent to which busing accomplishes desegregation that is the measure of its success. He said:

> The duty to desegregate schools does not depend upon the Coleman report nor on any particular racial proportion of students. The essence of the Brown decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and experience, and that segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation, however, would not become lawful if all children scored equally on all tests.

Senate Hearings, supra note 1, at 514 (statement of Hon. James B. McMillan).

In subsequent decisions, the Supreme Court has held that a desegregation plan requiring busing must be "feasible," that is, it must be "'workable,' 'effective,' and 'realistic'[--]'a plan that promises realistically to work, and . . . to work *now*.'"[147] In addition, the Court requires that the gains anticipated from a plan must not be outweighed by any risk the time and distance of travel may pose either to the health of the children involved, or to the educational process.[148] The federal courts thus are committed to a delicate balancing test that requires them to "reconcile the competing values in a desegregation case, . . . a difficult task with many facets but fundamentally no more so than remedial measures courts of equity have traditionally employed."[149]

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[145] *Brown II*, 349 U.S. at 299.

[146] *Id*.

[147] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971), *quoting* *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) (emphasis in the original).

Court-ordered desegregation plans are the product of records compiled in extensive, adversarial proceedings at the local court level. Where a constitutional violation is found, a separate hearing then generally is ordered to focus exclusively on determining the appropriate remedy. At that time, the court typically will hear testimony from school administrators, specialists in various facets of education policy, experts in the formulation of desegregation plans, community leaders, parents, and concerned citizens, among others.

The effect of the Helms-Johnston Amendment would be to cast aside this entire judicial procedure, and to substitute for the flexible, individually-applied tests of suitability and efficacy ordained by the Supreme Court, a blanket, irrebuttable presumption that court-ordered busing of more than 15 minutes or five miles in either direction is never feasible, and always poses an unjustifiable danger to the health of the children involved and to the educational process.150/ In an attempt to justify this disregard for the fact-finding abilities of the federal courts, the Helms-Johnston Amendment makes certain "findings" that are intended to support its limitations on busing. In summary, those "findings" are that:

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[148] Id. at 30-31. Consistent with the Supreme Court's ruling in Swann, courts have not been reluctant to limit the time and distances involved in court-ordered desegregation plans. In Northcross v. Board of Education of Memphis County Schools, 489 F.2d 15 (5th Cir.), cert. denied, 416 U.S. 962 (1973), the Fifth Circuit upheld the district court's approval of a plan that left 17 percent of the minority students in the school district in 25 predominantly black or all-black schools, but which limited the rides of the 38,000 children bused to no more than 45 minutes. See also, e.g., Thompson v. School Board of City of Newport News, Va., 498 F.2d 195 (4th Cir. 1974) (upholding the refusal of a district court to order elementary school busing where children would have trips in excess of one hour each way); Mims v. Duval County School Bd., 329 F.Supp. 123 (M. D. Fla.), aff'd, 447 F.2d 1330 (5th Cir. 1971).

[149] Swann, 402 U.S. at 30-31.

> (1) Court orders that result in busing in excess of the bill's provisions have proven ineffective to achieve unitary systems.
>
> (2) Busing has resulted in "white flight" from subject school systems.
>
> (3) The public will not accept busing, but will insist at all costs on neighborhood schools.
>
> (4) Transportation in excess of the bill's provisions is expensive and wasteful.
>
> (5) There is an absence of social science evidence to suggest that the benefits of busing outweigh its disruptiveness.151/

150/ As former Attorney General Elliot Richardson testified, "Congress cannot strike a permanent balance between the benefits derived from desegregated schooling and the social costs of attaining those benefits without preempting an essential function of the judiciary. It is inconsistent for the judiciary to have jurisdiction over desegregation cases and at the same time lack the corollary power to shape remedies suited to specific circumstances." 1982 School Desegregation Hearings, supra note 1, (statement of Elliot Richardson, at 5) (July 15, 1982).

151/ In full, the "findings" of the Helms-Johnston Amendment are as follows:

(Footnote continued)

The purpose of the following discussion is to review the findings of the Helms-Johnston Amendment in the light of current social science data.[152]

> The Congress finds that -
>
> (1) court orders requiring transportation of students to or attendance at public schools other than the one closest to their residences for the purpose of achieving racial balance or racial desegregation have proven to be ineffective remedies to achieve unitary school systems;
>
> (2) such orders frequently result in the exodus from public school systems of children causing even greater racial imbalance and diminished public support for public school systems;
>
> (3) assignment and transportation of students to public schools other than the one closest to their residence is expensive and wasteful of scarce petroleum fuels; [and]
>
> (4) there is an absence of social science evidence to suggest that the costs of school busing outweigh the disruptiveness of busing [sic].

S. 951, 97th Cong., 2d Sess. § 2(b), 127 Cong. Rec. S6644 (daily ed. June 22, 1981).

The Amendment also contains a fifth finding, summarized in the third item in the above text, that people prefer to send their children to neighboring public schools. Public opinion polls show that, all things being equal, most Americans do favor neighborhood schools. More importantly, however, those same polls also show that more people favor than oppose busing where it is the only viable remedy for school segregation. *See* U.S. Commission on Civil Rights, *Public Knowledge and Busing Opposition: An Interpretation of a New National Survey* (Mar. 11, 1973). *See also* *infra*, section III.C.

[152] In an unusual reversal of procedure, the Senate held its hearings on the Helms-Johnston Amendment while it was being debated on the floor. *See* *Senate Hearings*, *supra* note 1 (held May 22, September 30, October 1 and 30, 1981). The great bulk of the testimony at these four half-days of hearings came from educators, sociologists, demographers, and school board members who testified that research and practical experience directly contradicted each of the

(Footnote continued)

A. Is Busing Effective to Establish Unitary School Systems?

The first "finding" of the Helms-Johnston Amendment is that busing for the purpose of achieving racial balance is ineffective to create a unitary school system. This "finding" erroneously assumes that the purpose of court-ordered busing is to achieve racial balance, rather than to dismantle unconstitutional, dual school systems. While busing has had the effect of achieving racial balance in some cases,153/ that goal alone will not justify a busing plan, nor is it a necessary prerequisite to the creation of a constitutional, unitary school system.154/ Perhaps more to the point, however, there is absolutely no social science evidence that demonstrates that the development and implementation of a sound desegregation plan that calls for mandatory reassignments requiring busing is not effective to dismantle a

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Amendment's "findings."

The most comprehensive hearings held on the subject of school desegregation in recent years were conducted by the Senate Select Committee on Equal Educational Opportunity, chaired by then Senator Walter Mondale (D.-Minn.). The findings of that Committee, supported by more than 20 volumes of testimony, were reported to the Senate on December 31, 1972. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Toward Equal Educational Opportunity: The Report of the Select Committee on Equal Educational Opportunity (Comm. Print 1972). Significantly, they were consistent with the great bulk of material submitted at the 1981 Senate hearings, and wholly inconsistent with the purported "findings" of the Helms-Johnston Amendment.

153/ E.g., Riverside, California, and Charlotte-Mecklenburg Counties, North Carolina. "Racial balance" is the circumstance that occurs when the racial composition of each individual school in a system roughly reflects the racial composition of the system as a whole.

154/ See Milliken v. Bradley, 418 U.S. at 740-41.

prior, segregated school system. Indeed, the available evidence and common sense overwhelmingly point in the opposite direction.

In 1964, ten years after the Brown decision, when remedies were still largely voluntary, just one percent of the black students in the Deep South attended school with whites, while in the southern and border state region as a whole, the figure was only nine percent.[155] By 1968, these figures barely had begun to change: only 18 percent of black students throughout the South were attending majority white schools. By 1978, however, after Green [156] and Swann had called for mandatory student reassignment plans, many of which required extensive busing, the figure had increased to more than 44 percent. At the same time, some 38 percent of black students across the country attended majority white schools in 1978, up from 23 percent in 1968.[157]

Further, work by Professor Christine Rossell of Boston University on the effectiveness of desegregation plans to reduce racial isolation shows that in every case where busing has been used to break up a segregated school system, school integration -- measured by the opportunity for interracial contact -- has

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155/ U.S. Commission on Civil Rights, Southern School Desegregation 1966-67, at 5 (July 1967).

156/ Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

157/ U.S. Commission on Civil Rights, With All Deliberate Speed: 1954-19??, at 31 (November 1981).

increased.[158] Her conclusions are confirmed by other research studies published in a soon-to-be released book on strategies for effective desegregation.[159] Among the studies reported there is one by Mark Smylie of the Vanderbilt Institute for Public Policy Studies. Smylie's study analyzes the extent of segregation in 49 of the nation's largest school districts where the student population is between 25 and 75 percent minority. Partially confirming Rossell's findings, Smylie found that those districts with district-wide or metropolitan area desegregation plans achieved 84 percent of possible racial balance.[160]

Dramatic evidence of the success of federal civil rights enforcement in breaking up segregated school systems also is contained in a major new study of desegregation trends prepared by Professor Gary Orfield of the University of Chicago.[161] Orfield's study reveals that school desegregation generally progressed between 1968 and 1980, but that there are significant disparities among the various regions of the country, and that racial isolation of blacks in the Northeast, and Hispanics outside the South, has increased in some circumstances. Orfield concluded that "the most remarkable changes" have occurred in the South and a few states in other regions, and that they seem "to be clearly related to policies and enforcement efforts by the courts and federal executive agencies."[162] He also warned, however, that "[p]ressure has diminished in recent years and so has progress."[163]

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[158] Rossell, *The Effectiveness of Desegregation Plans in Reducing Racial Isolation, White Flight, and Achieving a Positive Community Response*, in *Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies* 1-87 (Nashville, Tenn.: Vanderbilt Univ., 1981); *School Desegregation Hearings*; *supra* note 142 (statement of Christine Rossell); H. Rep. No. 12, 97th Cong., 2d Sess. 19 (1982).

[159] Hawley, *et al.*, Strategies for Effective Desegregation: Lessons from Research (1982) (unpublished manuscript available from the Joint Center for Political Studies, Washington, D.C).

[160] A score of 100 percent would mean that the racial composition of individual schools perfectly reflected the racial composition of district-wide enrollment. Smylie found that, on the average, districts that had mandatory plans achieved 65 percent of possible balance, while those with voluntary plans achieved only 18 percent of possible district-wide racial balance. *See id.* at 5.

B. What Is the Effect of Busing on White Flight and Resegregation?

The second "finding" contained in the Helms-Johnston Amendment is that busing causes greater racial imbalance because it results in an exodus of children from the public schools. The simple response to this statement, as reported in the previous section, is that there has been a consistent and significant increase in minority students attending predominantly white schools for more than a decade. In addition, between 1968 and

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[161] Orfield, Desegregation of Black and Hispanic Students from 1968 to 1980 (Washington, D.C.: Joint Center for Political Studies, 1982).

[162] Id. at A 10, col. 3.

[163] Id.

1978 -- when many of the nation's most comprehensive busing plans were implemented -- the overall proportion of white students enrolled in public schools increased, while the proportion attending private schools declined.[164] A more complete answer is found in the uniform conclusion of social scientists who have studied the issue: there is no significant or lasting relationship between white flight and school integration in the nation's largest cities.[165]

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[164] Rossell & Hawley, Understanding White Flight and Doing Something About It, in Effective School Desegregation 157, 167-68 (W. Hawley ed.) (Beverly Hills, Calif.: SAGE Publications, 1981).

[165] See, e.g., Farley et al., School Desegregation and White Flight: A Resolution of Conflicting Results 7 (Ann Arbor, Mich.: Univ. of Michigan Center for Population Studies, 1979); Henderson & von Euler, What Research and Experience Teach Us About Desegregating Large Northern Cities, 7(1) Clearinghouse for Civ. Rts. Research, Spring, 1979, at 2.

A very recent report on "white flight" in Cleveland, Ohio, prepared by Professor of Political Science Everett Cataldo, confirms Farley's conclusions. See Cataldo, Enrollment Decline and School Desegregation in Cleveland: An Analysis of Trends and Causes, filed in Reed v. Rhodes, Civ. Action No. 73-1300 (N.D. Ohio, filed Dec. 12, 1973) (available from the Office of School Monitoring and Community Relations, Cleveland, Ohio). In summary, Cataldo found that while some whites fled the school system for private schools in the city or for suburban schools, a careful analysis of each transfer revealed that:

> A large number of white transfers immediately before and during busing were to districts beyond Cleveland's suburbs, out of the state or out of the county, making busing an unlikely reason for the moves.
>
> White enrollment had been steadily declining for a decade before integration began, because of the falling birth rate and the growth of the suburbs, although the rate of white departures increased slightly during integration.
>
> Some suburban school districts, untouched by desegregation efforts, lost proportionately more students than the city did in desegregation.

(Footnote continued)

The school bus has become such a normal part of our national life that the neighborhood school -- defined as one to which elementary school children can walk -- is an anachronism in many parts of the country. Indeed, one-half of the nation's school children are bused to school -- only 3.6 percent of whom participate in desegregation plans.166/ Among families with actual experience with busing, both for convenience and to achieve desegregation, there is no evidence that they flee the public school system because their children are bused to school, or are bused particular distances.167/

The president of the National Association for Neighborhood Schools, an organization that strongly supports the Helms-Johnston Amendment, has stated that the real issue for his organization is not busing, but "a perception of what has happened to the quality of education" as a consequence of school

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> Cleveland and its school system were beset by a host of disturbing developments around the time integration began, including strikes by teachers and the police, the city's fiscal default and rapidly rising unemployment, that could reasonably be seen as contributing to some families' decisions to leave the city.

N.Y. Times, Sept. 10, 1982, at A 14, col. 1.

166/ H. Rep. No. 12, supra note 158, at 18; U.S. Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law 202 (1976).

167/ Rossell & Hawley, supra note 164, at 173; see also Rossell, supra note 158, at 40-41; Rossell, Is it the Distance or the Blacks? (Boston, Mass: Boston, Univ., 1980); H. Rep. No. 12, supra note 158, at 3, 4.

desegregation.[168] Increasingly, social science data has shown that this "perception" is a product of ignorance, and that it tends to change radically as people acquire actual experience with busing. This can be seen, inter alia, from the fact that parents who have some personal involvement with busing and desegregated schools tend to be far more supportive of both than those who have had no such experience.[169] In fact, most desegregation-related white flight occurs before parents and children have had any experience with either busing or the educational quality of desegregated schools.[170] It thus appears that both busing and quality of education issues may serve only to obscure the truth about white flight.

"White flight" originally was used to describe the post-World War II exodus of the white middle class from the center-city. This flight was attributed not to "push" factors that made the city less attractive, but to "pull" factors that made the suburbs more attractive. People were looking for larger homes with more land. They found that the suburbs offered both for less than the city, due in part to lower tax rates and federal housing loan policies. At about the same time, business and industry started locating in the suburbs, so that job opportunities existed there as never before.[171] This same movement to the suburbs and beyond continues today, and accounts for the vast majority of "white flight" currently identified by social scientists.[172]

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[168] School Desegregation Hearings, supra note 142, at 517 (statement of William D'Onofrio).

[169] Rossell & Hawley, supra note 164, at 165-66. See also infra section III. C. (discussion concerning Harris and CBS/N.Y. Times polls).

[170] U.S. Commission on Civil Rights, supra note 157, at 1-14; Senate Hearings, supra note 1, at 511-26 (statement of Hon. James B. McMillan); School Desegregation Hearings, supra note 142, at 3, 4 (statement of Hon. Peter W. Rodino).

The debate over desegregation-related white flight for the most part has ignored academic research -- research that has consistently shown little lasting relationship between desegregation and white disenrollment.[173] In many situations, court-ordered desegregation remedies do not cause even temporary white flight. For example, small and medium-sized cities rarely experience white flight at all.[174] After implementation of extensive desegregation plans, cities from Sacramento, California, to Ann Arbor, Michigan, maintained white enrollment at figures consistent with pre-desegregation years.[175]

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[171] H. Rep. No. 12, supra note 158, at 16.

[172] The historic "pull" of whites from northern inner cities to the suburbs now accounts for a white population decline of approximately four to eight percent per year, and for a decline in white enrollment in inner city schools of approximately two percent per year. In the northern suburbs, the same historic movement results in a two to four percent annual population decline, and disenrollment of white children from public schools of approximately one percent.

In some cities, of course, "pull" factors account for a significantly greater white population decline. For example, the white population decline in Chicago has been as severe as in any city in the nation -- including those most often cited by supporters of the Helms-Johnston Amendment: Boston and Los Angeles -- but Chicago has had very little school desegregation and no court-ordered busing. In 1976, without court-ordered busing or any other large scale intervention to reduce or eliminate racial segregation, the Chicago public schools were 25 percent white and 75 percent minority, principally black. By 1978-79, the percentage of white students had declined to 21 percent. By 1980-81 -- still without court-ordered busing -- it had declined to 18.6 percent. School Desegregation Hearings, supra note 142, at 219 (statement of Christine Rossell).

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[173] Rossell, *supra* note 158, at 20-23; *see also* Farley, *Racial Integration in the Public Schools, 1967-1972: Assessing the Effects of Governmental Policies*, in 8 Sociological Focus 3 (1975); Fitzgerald & Morgan, *School Desegregation and White Flight: North and South*, 15(6) Integrated Educ. 78 (1977); Mercer & Scout, *The Relationship Between School Desegregation and Changes in the Racial Composition of California School Districts, 1966-73* (Riverside, Calif.: Univ. of California, 1974); Rossell, *School Desegregation and White Flight*, 90 Pol. Sci. Q. 675 (1976); Jackson, *Reanalysis of Coleman's Recent Trends in School Integration*, 10(4) Educ. Researcher 21 (1975).

The one researcher who has reached a different conclusion is James S. Coleman; however, the value of Coleman's work on white flight has been diminished substantially by a variety of deficiencies, including his failure to focus on either school systems that were desegregted by court-order, or systems that had mandatory busing plans. Indeed, Coleman's research on the relationship between school desegregation and white flight relies entirely on a non-random study of 20 southern school districts, not one of which appears ever to have undergone court-ordered desegregation. *See* Pettigrew & Green, *School Desegregation In Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46(1) Harv. Educ. Rev. 1, at 12 (1976); Reinhold, *Coleman Concedes Views Exceed New Racial Data*, N.Y. Times, July 11, 1975, at 1, col. 4. In addition, Coleman's study also was flawed by his failure to identify and control for white disenrollment caused by historic "push" factors. In effect, Coleman implied -- wholly without supporting data and contrary to the conclusions of virtually every social scientist who has published on this issue -- that there was a causal connection between all white flight and school integration. Pettigrew & Green, *supra* at 4-5.

Moreover, Coleman's non-random selection of cities for his study -- including Atlanta and Memphis, which experienced uniquely extreme white flight, and omitting Jacksonville, Miami, and Nashville, which had more typical experiences -- further prejudiced his findings even as applied to the South. *Id.* at 5, 17. (Coleman's inclusion of Atlanta in his study is particularly ironic. Not only did Atlanta not experience busing to achieve desegregation, but, as a consequence of a compromise struck between the NAACP and then Georgia Governor Jimmy Carter, it also experienced very little desegregation. For a discussion of the effect of the "Atlanta Compromise," see Orfield, *Housing Patterns and Desegregation Policy*, in *Effective School Desegregation* 185 (W. Hawley ed.) (Beverly Hills, Calif.: SAGE Publications,

(Footnote continued)

Similarly, but at the other end of the spectrum, metropolitan area and county-wide plans, often involving extensive busing, not only have proved stable, but in some cases also have led to residential integration. In a 1980 study, Dr. Diana Pearce of the Center for National Policy Review examined seven pairs of cities matched for geographic location and percentage of

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1981).

Coleman's methodological and design errors, and the fact that other researchers reviewing his data could not confirm his findings, have led most of the social science community to discredit his work. Pettigrew & Green, supra, at 20, 23. Moreover, even if Coleman's findings were defensible, they would predict only that the maximum impact of desegregation in a city with a 50 percent minority school population would be that its schools would approach a 100 percent minority student population one year earlier than if they had not been desegregated. Rossell, School Desegregation and White Flight, supra note 173, at 688.

[174] Coleman, Racial Segregation in the Schools: New Research With Policy Implications, 57 Phi Delta Kappan 75, 77 (1975); Pettigrew & Green, supra note 173, at 4-5; Rossell, School Desegregation and White Flight, supra note 173.

[175] Rossell, School Desegregation and White Flight, supra note 173, at Appendix 2.

minority enrollment in public schools.[176] The only difference between the cities in each pair was that one had experienced metropolitan or area-wide desegregation for a minimum of five years, while the other had no metropolitan desegregation.

Rather than finding an increase in white flight, the Pearce study found that cities with metropolitan area desegregation plans enjoyed increased residential integration, one collateral benefit of which may be a decreased need for busing. In Riverside, California, for example, after 15 years of metropolitan area school desegregation, only three of 24 elementary schools required busing to combat the continuing effects of segregation. The attendance zones surrounding the remaining 21 schools had become sufficiently integrated residentially to obviate the need for busing.[177]

In explaining these results, Dr. Pearce noted that racial identification of schools historically has been an important factor in creating segregated neighborhoods. Real estate brokers typically use the racial characteristics of public schools to identify the neighborhood racially, and then market houses in that neighborhood along racial lines. Once schools are no longer earmarked as white or black, racial barriers in housing are lowered. This process may be accelerated by integration plans that exempt desegregated neighborhoods from busing requirements. The findings of the Pearce study strongly suggest that metropolitan area school desegregation plans involving extensive busing actually can promote community stability.

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[176] Pearce, Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns (Washington, D.C.: National Institute of Education, 1978).

[177] Id.; see also, Levin, School Desegregation Remedies and the Role of Social Science Research, 42(4) L. & Contemp. Probs., Auttumn, 1978, at 13-14 n.76.

For all of these reasons, the controversy over white flight has not focused on desegregation plans implemented in small cities or in metropolitan areas. Rather, it has focused selectively on plans affecting only the central-city, and not the suburbs, of major cities with substantial minority enrollments.[178] In those cases, significant decreases in public school enrollments have been noted in the period immediately surrounding the implementation of a significant desegregation plan. However, social scientists have found that these decreases are limited to the immediate pre- and post-implementation period. By the third year of a plan's operation, the rate of decline in white enrollment usually has stabilized at pre-plan levels, or, in some cases, at a level below the pre-plan level.[179] These findings are consistent with a study prepared for the United States Civil Rights Commission by Professors Robert Green and Thomas Pettigrew, which also concluded that the

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[178] Studies show that center-city only plans affecting substantial desegregation result in an average, one-time only doubling of the normal percentage decline of white enrollment experienced in the school district. Coleman et al., Recent Trends in School Integration (April 1975) (unpublished report presented at the annual meeting of the American Educational Research Association); Coleman, et al., Trends in School Segregation, 1968-73 (Washington, D.C.: The Urban Institute, 1975); Farley, et al., supra note 164. In county-wide plans, other studies show that the initial loss attributable to desegregation is about one half as great as in city-only plans. Rossell & Hawley, supra note 164, at 166.

The 1980 Rossell study, which contains the most comprehensive review of the available research data -- including analyses of data collected in 113 separate studies of different school districts -- shows that the "average desegregation plan," when implemented in a city with more than 35 percent minority enrollment, results in an average, one-time, eight percentage point additional decline in white enrollment. (The "average desegregation plan," as revealed by the results of Rossell's study, consists of a reassignment of 30 percent of the black student population, and five percent of the white student population, which brings about a 30 percentage point reduction in segregation. See Rossell, supra note 158, at 25, 30; Rossell & Hawley, supra note 164, at 165-66.) An average plan, implemented in a county with a 35 percent minority enrollment, results in an average, one-time, six percentage point additional decline. Id. In a city with less than 35 percent minority enrollment, the additional, one-time only enrollment decline attributable to desegregation is an average of five percentage points, and in a county of that
(Footnote continued)

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same racial composition, the additional decline is an average of two percentage points. Id. In districts in which the desegregation plan requires that only black children be bused, the data suggests that white disenrollment is approximately one third to one half as great in each setting. Rossell & Hawley, supra note 164, at 165-66. A few other, smaller studies have resulted in somewhat more exaggerated findings. However, their results either can not be reproduced by other social scientists using the same data base, or the studies generally are considered to be severely prejudiced by substantial methodological errors and sampling deficiencies. Pettigrew & Green, supra note 173, at 12.

[179] See Rossell, School Desegregation and Community Social Change, 42 (3) L. & Contemp. Probs., Summer 1978, at 133; Rossell, supra note 158, at 23; School Desegregation Hearings, supra note 142, at 220-21 (statement of Christine Rossell); H. Rep. No. 12, supra note 158, at 16; Coleman, Racial Segregation in the Schools, supra note 174, at 77; Rossell & Hawley, supra note 164, at 170; see also Rossell & Ross, The Long-Term Effect of Court-Ordered Desegregation on Student Enrollment in Central City Public School Systems: The Case of Boston, 1974-1979, (1979) (unpublished report available from Boston Univ.); Armor, White Flight and the Future of School Desegregation, in Desegregation: Past, Present, and Future (W. Stephan & J. Feagin eds.) (New York, N.Y.: Plenum Press, 1980).

general effect of any drop in white enrollment is short-lived.[180]

Of course, the stability of individual desegregation plans may vary with the character of the plan and the quality of educational and community leadership. There now has been sufficient experience with desegregation to identify a variety of affirmative strategies that enhance the positive effects of integregation. They include: (1) initiation of curriculum reforms concommitant with the implementation of the desegregation plan; (2) provision of special teacher training designed to ameliorate any transitional difficulties; (3) provision of incentives for residential integration, such as exemption from busing; (4) establishment of a good public information system;

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[180] Green & Pettigrew, Public School Desegregation and White Flight: A Reply to Professor Coleman (report for the U.S. Civil Rights Commission, Dec. 8, 1975), published as School Desegregation in Large Cities: A Critique of the Coleman

and (5) initiation of cooperative programs with neighboring school districts in the same metropolitan area.[181]

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[181] See, e.g., Rossell, supra note 158; Rossell, Understanding White Flight and Doing Something About It, in Effective School Desegregation 157 (W. Hawley ed.) (Beverly Hills, Calif.: SAGE Publications, 1981); School Desegregation Hearings, supra note 142, at 420-21 (statement of Willis D. Hawley); Henderson & von Euler, supra note 165; Orfield, Must We Bus? (Washington, D.C.: Brookings Instit., 1978); Armor, White Flight, Demographic Transition, and the Future of School Desegregation (Santa Monica, Calif.: Rand Corp., 1978); H. Rep. No. 12, supra note 158, at 26-28.

Supporters of the Helms-Johnston Amendment often point to Boston and Los Angeles as cities that have suffered substantial desegregation-related white flight. These cities are atypical, however, not only because each had an unusual overabundance of uncontrollable factors that typically enhance white flight, but also because local authorities and citizens' groups in each city were unable or unwilling to ameliorate the effects of desegregation by controlling those factors that they could.

The experience of Boston and Los Angeles could have been predicted from the character of their political and educational leadership. Their desegregation plans were implemented with agonizing slowness, and to the accompaniment of great protest and extensive media coverage. These cities are no more typical of the experience of the average urban school district than is the unusually felicitous experience of Riverside, California, where uncontrollable factors were favorable, and controllable factors well-handled. See supra note 177 and accompanying text.

Nevertheless, the total desegregation-related losses in Los Angeles, including those white students who withdrew in the two years preceding implementation of the mandatory component of the district's plan, accounted for no more than one-half of all white flight that occurred during those periods studied. The remaining disenrollment was caused by "normal" demographic factors. Armor, supra; 128 Cong. Rec. S. 964 (daily ed. Feb. 23, 1982) (statement of David J. Armor) (introduced by Senator Slade Gorton (R-Wash.) in support of the "Gorton Amendment" to the Johnston Amendment) (the Gorton Amendment would have prohibited any student assignment on the basis of race). Thus, one might reasonably hypothesize that Los Angeles' desegregation-related losses would have fallen well within the general norms -- that is, they would have doubled in the plan's implementation year, and then returned quickly to a rate at or below pre-desegregation levels -- if

(Footnote continued)

Parenthetically, many of the affirmative efforts to improve educational quality, either as an adjunct to court-ordered desegregation or as an incentive to voluntary desegregation, were paid for by federal funds made available through the Emergency School Aid Act.[182] Studies evaluating the effectiveness of ESAA in reducing racial isolation, meeting special needs incident to the elimination of segregation and discrimination, and assisting children to overcome educational disadvantages associated with racial isolation attest to the value and importance of the program.[183] But the same Congress that is considering the Helms-Johnston Amendment -- indeed the same Senate that has passed it -- has eliminated the Emergency School Aid Program, and rolled the vestiges of its funding into block grants to the states. The states, of course, have discretion to decide which education activities they will fund with their reduced allocations. As a result, assistance for desegregation activities has been reduced sharply. For example, New York City, which has the nation's largest public school system, saw its aid drop from $10 million for the 1980-81 school year to $6.2 million

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its plan had been implemented in one year, without the plethora of protest and publicity that preceded and accompanied it. For similar reasons, the same hypothesis reasonably may be postulated for Boston.

[182] 20 U.S.C. § 3191 *et seq*. (1978) [hereinafter cited as ESAA].

[183] *See*, *e.g.*, Wellish, *et. al.*, *An In-depth Study of Emergency Schol Aid Act Schools* (Santa Monica, Calif.: System Development Corporation, July 1976).

in 1981-82, and then plummet to only $9,000 for the 1982-83 school year.[184]

In sum, the second Helms-Johnston "finding" -- that busing causes significant white disenrollment and results in resegregation -- is without substantial scientific or experiential basis, and is materially misleading because most white flight is wholly unrelated to school desegregation. While desegregation, including desegregation by court-ordered busing, may lead to some additional white flight under certain conditions, it has no significant, long-term effect on the school districts in which it occurs.

C. Does the Public Accept Busing for Desegregation?

Not surprisingly, opinion polls show that in the abstract, most Americans favor integration of public schools, but oppose busing as a method of integration. If the two issues are linked, however, and busing is posited as a tool essential to accomplish desegregation, resistance to busing drops, and more people favor than oppose it.[185]

A March 1981 Harris poll that tested attitudes towards desegregation asked interviewees if they felt that five years from now, most black and white children would be going to school together. Nationwide, 52 percent of those polled said yes.[186] Other results of the same poll suggested that school busing for racial purposes has worked well in most communities, and that it results in greater school integration. Further, they also show that most Americans believe that black children will get a better education if they attend integrated schools.

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[184] N.Y. Times, Sept. 7, 1982, at A 1, col. 3.

[185] Orfield, *supra* note 181.

Interestingly, polls that reflect the opinions of those with actual experience with court-ordered busing show more acceptance of busing than polls that reflect the views of those who deal with busing only as an abstract notion. Especially significant in this regard are two 1981 polls: one, the previously discussed Harris poll, and the other, a poll taken by CBS/N.Y. Times in January 1981. The CBS/N.Y. Times Poll showed, for example, that 70 percent of those in communities that have undergone or are considering desegregation by busing have accepted busing and are not actively protesting it.[187] At the same time, this poll and a subsequent CBS/N.Y. Times Poll taken in June 1981 show that in the abstract, about three of every four Americans are opposed to busing for integration.[188]

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[186] See Harris, The Harris Survey (New York, N.Y.: The Tribune Company Snydicate, Inc., March 26, 1981) (with reference to busing and school desegregation).

[187] See CBS/N.Y. Times Poll, January, 1981.

The most important result was reported by the Harris poll, however, which revealed that among American families whose children have been bused to school for the purpose of desegregation, 54 percent said the experience had been very satisfactory, 33 percent said it had been partly satisfactory, and only 11 percent felt that it had been unsatisfactory.[189] In short, an overwhelming majority of persons who have had actual experience with busing report that it has been a satisfactory experience.

One in-depth study of a community's response to large-scale busing was done in Charlotte-Mecklenburg, North Carolina, where county-wide desegregation by court-ordered busing began in the 1970-71 academic year. That study, completed in 1978, revealed that all but three of the respondents thought that people's attitudes towards busing had changed positively since 1970.[190] Charlotte-Mecklenburg Superintendent of Schools Dr. Jay Robinson has attempted to explain why most people, black and white, who are involved with busing, support it. Citing not only increased parental and community support for the public schools, but also a prevailing spirit of optimism in the educational system, Dr. Robinson testified that he "would prefer being superintendent in Charlotte-Mecklenburg to any other large school system in the country" because the community is now "a better place to live," and the overall quality of the schools is "better today than it would have been if the Swann decision had never been made."[191]

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[188] See id.; CBS/N.Y. Times Poll, June, 1981. The question asked in each poll was, "Do you favor busing of school children for the purpose of racial integration or do you oppose busing school children for this purpose?" The January 1981 poll results showed 17 percent favoring and 77 percent opposing busing; the June 1981 poll shows 16 percent favoring and 77 percent opposing, with the remaining percentages in both cases expressing no opinion.

[189] Harris, supra note 186. Of the white families who had experienced busing, the poll showed that 48 percent felt it had been very satisfactory, 37 percent partly satisfactory, and only 13 percent felt that it had been unsatisfactory. Of black families who had been part of a busing plan, 75 percent felt it was a very satisfactory experience, 21 percent said it was partly satisfactory, and only five percent felt it was not satisfactory.

In a similar vein, the President of the Seattle, Washington, School Board testified that as a result of its desegregation plan, which required extensive busing, racial harmony in Seattle was enhanced, student achievement scores rose, and the trend toward residential segregation was slowed if not reversed.[192] A former member of the Louisville, Kentucky, School Board testified that after experiencing extensive busing to achieve desegregation, Jefferson County enjoyed greater housing desegregation, steadily improving test scores for both black and white children, school board elections free from the issue of school

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190/ Maniloff, Community Attitudes in Charlotte, 16 Integrated Educ., September-October 1978, at 9.

191/ School Desegregation Hearings, supra note 142, at 18-19 (statement of Dr. Jay Robinson).

192/ Senate Hearings, supra note 1, at 608 (statement of Suzanne Hittman).

desegregation, and little if any desegregation-related white flight.[193]

Joseph E. Johnson, Superintendent of the Red Clay Consolidated School District in Wilmington, Delaware, told a House Subcommittee that since July 1978, when busing began in his district, test scores had improved and racial isolation of minority students had been reduced. Dr. Johnson concluded, "it is fair to say that a high degree of racial harmony exists in our schools. Students and staff are interacting and working together."[194]

Finally, Dr. Lee McMurrin, Superintendent of the Milwaukee, Wisconsin, public schools, testified to the successful experience Milwaukee has had with a court-ordered desegregation plan that requires 37,000 children to be transported to school daily. He said:

> Our children go to integrated schools because they want to be there. We have moved from the negative to the positive. Students no longer leave one school to attend another because it has a racial mix more to their liking. They now attend a particular school because it offers the program they want, and the fact

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[193] Senate Hearings, supra note 1, at 603-06 (statement of Carolyn Hutto).

[194] School Desegregation Hearings, supra note 142, at 446 (statement of Joseph E. Johnson).

> that their school is racially integrated has become a plus factor. 195/

D. Does Desegregation Provide Educational and Related Benefits Not Available in Segregated Schools?

The testimony cited in the previous section on the positive outcomes of school desegregation plans runs counter to the gravamen of the fifth "finding"196/ of the Helms-Johnston Amendment, which is that busing is more disruptive of the educational process than it is beneficial. These individual accounts are buttressed by systematic studies of the educational

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195/ City School Desegregation and Block Grant Legislation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 2d Sess. (forthcoming) (statement of Dr. Lee R. McMurrin, at 1) (Sept. 9, 1982).

196/ The fourth "finding" of the Helms-Johnston Amendment is that busing to achieve desegregation in excess of that permitted by the bill is too expensive, and is wasteful of "scarce petroleum fuels." While consistent with popular conjecture about busing, this view is completely contrary to the facts.

Public opinion research has shown that by a margin of six to one, people believe that busing to achieve desegregation adds 25 percent or more to the average school district's budget. U.S. Commission on Civil Rights, supra note 157, at 10. In fact, among those districts that provided information to the Senate Select Committee on Equal Education, the range of costs attributable to busing to achieve desegregation was from .1 percent to a maximum of 2.2 percent of each school district's budget. Id. at 11. The Department of Health, Education and Welfare reached similar conclusions using data from the 1973-74 school year. It reported to Congress that the cost of busing to achieve desegregation accounted for only .2 percent of total school district budgets. H. Rep. No. 12, supra note 158, at 19.

and other, collateral benefits stemming from court-ordered desegregation plans. For example:

Educational Benefits -- An analysis of the effect of busing on the quality of education is an integral part of any measurement of its benefits and burdens. Therefore, it is very significant that virtually all pertinent research regarded as methodologically sound by the social science community shows that as a consequence of desegregation achieved through court-ordered busing, academic achievement levels of minority students have risen significantly, while those of white students have risen slightly, or stayed the same.[197] An overview of this phenomenon is provided by a 1981 report of the National Assessment of Educational Progress, which notes significant gains over the past decade in the reading scores of minority elementary school children, with the largest gains taking place in the Southeast where comprehensive desegregation plans were being implemented in the 1970's.[198]

Two recent and particularly noteworthy studies were conducted by Robert L. Crain, a senior social scientist at the Rand Corporation, and Rita E. Mahard, an assistant social scientist at the Rand Corporation and the University of Michigan. The first study, published in 1978, consisted of a

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197/ Crain & Mahard, Desegregation and Black Achievement: A Review of the Research, 42(3) L. & Contemp. Probs., Summer 1978, at 17; H. Rep. No. 12, *supra* note 158, at 10.

198/ National Assessment of Educational Progress, 3 National Assessments of Reading: Changes in Performance, 1970-80 xiii (Denver, Colo.: Education Commission of the States, 1981).

review of 73 separate studies of desegregation and black achievement that had been conducted by other researchers.[199/] Crain and Mahard concluded that these studies showed a general rise in black students' achievement scores following desegregation of their schools.[200/] Specifically, 40 of the 73 studies showed that black students had made significant achievement gains, while only twelve studies showed any declines.[201/] Moreover, the authors noted that, as a group, the studies showing declines were methodologically inferior to those showing gains.[202/] Further, some of the studies that did not show significant gains were conducted entirely in the first year of the desegregation process, while the students were still adapting to a change in educational environment and had not had the opportunity to absorb its maximum benefits.[203/]

The second Crain and Mahard study, titled Desegregation Plans That Raise Black Achievement: A Review of the Research,

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[199/] Crain & Mahard, supra note 197.

[200/] Id. at 21.

[201/] Id. at 24, Table 2.

[202/] Id. at 25-29.

[203/] Id. at 32-34.

was published June 1982.[204] It entailed a "meta-analysis" of 93 studies of the effects of desegregation on black achievement. Controlling for the extraneous effects of differences in methodology, Crain and Mahard were able to confirm not only that achievement scores for minority students rose in desegregated schools -- according to their estimates, by an average of approximately one grade-year -- but also that, on the average, their I.Q. scores rose at an even greater rate.[205] Additionally, without exception, the studies concluded that desegregation had no adverse effects on achievement scores of white students.[206]

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[204] Crain & Mahard, Desegregation Plans That Raise Black Achievement: A Review of the Research (Santa Monica, Calif.: Rand Corp., 1982) [hereinafter cited as Crain & Mahard (1982)]. Two other, substantially identical studies relying on the same research data were published by Crain and Mahard in 1981. See Crain & Mahard, Some Policy Implications of the Desegregation-Minority Achievement Literature, in V Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies (W. Hawley ed.) (Nashville, Tenn.: Vanderbilt Univ., 1981); Crain & Mahard, Minority Achievement: Policy Implications of Research, in Effective School Desegregation (W. Hawley ed.) (Beverly Hills, Calif.: SAGE Publications, 1981) [hereinafter collectively cited as Crain & Mahard (1981)]. The conclusions reached in their 1981 papers were confirmed and adopted, and to some extent expanded, in their 1982 paper.

[205] Crain & Mahard (1982), supra note 204, at v, 19-22, 24-25, Appendix C. In their 1981 papers, Crain and Mahard concluded that the average I.Q. increase for a black child was four points. Crain & Mahard (1981), supra note 204, at, respectively, 189-90 and 68-69. They reported that the mean I.Q. score for black children tested was 91. Thus, a four point gain would halve the gap between 91 and 100, a so-called "normal" I.Q.

[206] Crain & Mahard, supra note 197, at 18.

Crain and Mahard also attempted to identify those features of desegregation plans that have an impact on achievement. First, they determined that plans that begin the desegregation process in the early grades work best, as students desegregated at the kindergarten or first grade level showed consistently higher achievement gains than students desegregated at a later point.[207]

Second, their research showed that the comprehensiveness of the desegregation plan is important. Piecemeal plans that make reassignments without diagnostic or compensatory services for students, and workshops and in-service training programs for staff, were found to be less effective in bringing about achievement gains. Thus, they concluded that the more a school prepared for desegregation, the more positive was its impact on minority achievement.[208]

Third, and crucial to the busing issue, they found that metropolitan area and county-wide desegregation plans invariably showed stronger gains than central-city only plans.[209] Sizable achievement gains for minority students were recorded in Hartford and New Haven, Connecticut; Newark, New Jersey; Nashville-Davidson County, Tennessee; Rochester, New York; and Louisville-Jefferson County, Kentucky, all districts that have metropolitan

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207/ Crain & Mahard (1982), supra note 204, at 35.

208/ Id.

209/ Id.

area or county-wide plans.[210] Indeed, in Louisville-Jefferson County, black students' overall achievement scores rose at a rate double that of white students.[211]

The success of these metropolitan area and county-wide plans may be attributable to the fact that all public schools in the area are integrated, and, thereafter, that each usually consists of a majority of advantaged students.[212] Indeed, the well-publicized 1966 Coleman Report to the Department of Health, Education and Welfare found that achievement gains for low income students occurred most frequently when they attended schools consisting predominantly of advantaged pupils.[213] Yet, under Helms-Johnston, successful metropolitan area plans that rely on court-ordered busing, almost all of which involve busing of more than five miles and 15 minutes, would be dismantled.

Another pertinent paper which was prepared for the Rockefeller Foundation in 1981 evaluated metropolitan school desegregation in New Castle County, Delaware.[214] It involved a longitudinal study of county-wide desegregation, and assessed and described trends in achievement and attitude changes. The authors found that students in New Castle County historically had scored above the national norm on standardized tests. In 1978, the first year in which county schools were desegregated and the same standardized test was administered to all students in the district, students scored on the average four months above the norm. In 1979, students scored eight months above the national norm, and by 1980 they had stretched their lead to a year. The study concluded, based on this and related data, that metropolitan school desegregation in New Castle County was associated with these positive, district-wide achievement gains.

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[210] Crain & Mahard (1982), *supra* note 204, at 30-31.

[211] *Id*.

[212] *See id*. at 35.

[213] *See* Coleman *et al*., *Equality of Educational Opportunity* (New York, N.Y.: Arno Press, 1966). This basic finding has been confirmed by numerous reanalyses of the data in the Coleman Report. *See*, *e.g.*, Mosteller & Moynihan, *Equality of Educational Opportunity* (New York, N.Y., Vantage Press, Inc., 1972); U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967).

The reasons that minority children do better in integrated schools are not fully understood. One explanation is that educational improvements and a substantial infusion of human and financial resources often accompany the implementation of mandatory desegregation plans.[215] Another related explanation is that "teachers who deal with heterogeneous classrooms . . . begin to be more sensitive to stereotyping and low expectations that have held for minority students and take steps to ameliorate their effects."[216] The potential that desegegration affords for changes in teacher sensitivities and student norms is reinforced by anecdotal evidence, such as the comment of one black student who testified before the U.S. Civil Rights Commission about her experience in a desegregated school. She said, "In my old school people asked, 'Are you going to college?' In my new school they asked, 'Which college are you going to?'"

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[214] See Green et al., Metropolitan School Desegregation in New Castle County, Delaware: A Longitudinal Case Study (East Lansing, Mich.: Michigan State Univ., College of Urban Development, 1980).

[215] See H. Rep. No. 12, supra note 158, at 10.

Increased Mobility for Minority Students -- There is a small but growing body of evidence that school desegregation results in other, indirect educational and social benefits. A study by James McPartland, Co-director of the Center for Social Organization of Schools at Johns Hopkins University, shows that black children attending desegregated schools are more likely to: (a) complete high school; (b) go to college; (c) select a four-year rather than a two-year college; (d) select a desegregated college; (e) major in fields of study that are not traditional for minority students, and are designed to lead to more remunerative jobs and professions; and (f) finish college.[217] Indeed, total enrollment of black students in post-secondary institutions surpassed one million in 1976. This represents an increase of more than 100 percent from 1970 levels.[218]

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[216] School Desegregation Hearing, supra note 142, at 425 (statement of Willis D. Hawley, Professor of Political Science at Vanderbilt Univ.).

[217] McPartland, Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools, 42(3) L. & Contemp. Probs., Summer, 1978, at 110-13; H. Rep. No. 12, supra note 158, at 13-14; see generally infra note 219.

McPartland's study also suggests that desegregated schools give rise to collateral, non-education related benefits. He reports, for example, that black adults who attended desegregated schools may have: (a) access to better information networks from which to secure job opportunities; (b) a better perception of their true occupational opportunities; (c) more confidence in their ability to succeed in interracial settings; and (d) greater success in obtaining positions in more remunerative fields and occupations.[219] Further the study confirms that both black and white adults who have attended desegregated schools are more likely to live in desegregated neighborhoods, send their children to desegregated schools, and have close friends of another race.[220]

Broader Experience for White Students -- A very real but often ignored benefit of desegregation is its collateral effect on white students, who also have been victims of racial isolation. Although not quantifiable, their experiences in segregated schools may be less realistic, interesting, and stimulating than those of students in integrated schools. Desegregation provides them with the opportunity to learn first-hand that students with different racial, cultural, economic, and social backgrounds can live and work together. Robert W. Peebles, Superintendent of the Alexandria, Virginia, public schools described as follows the success of desegregation in changing the sterile environment typical of many suburban schools:

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[218] Watson, Education: A Matter of Grave Concern, in The State of Black America 59 (J.D. Williams ed.) (New York, N.Y.: Nat'l Urban League, 1980).

[219] See, e.g., McPartland, supra note 217, at 110-13, 124, 131; McPartland & Braddock, Going To College and Getting A Good Job: The Impact of Desegregation, in Effective School Desegregation 141, 146-51 (W. Hawley ed.) (Beverly Hills, Calif.: SAGE Publications, 1981); Armor, The Evidence On Busing, 28 Pub. Interest 90, 105-06 (1972); Pettigrew, Report to the Honorable Judge Paul Egly in Response to Minute Order of February 7, 1978, submitted in Crawford v. Board of Education, Civ. Action No. 822-845 (L.A. Sup. Ct. 1978); School Desegregation Hearing, supra note 142, at 432-37 (statement of James McPartland).

[220] McPartland, supra note 217, at 157; McPartland & Braddock, supra note 219, at 152.

> This past school year, Alexandria's student population declined less than 1 percent. Parents in this city, black and white, have experienced success in the mix that took place with desegregation. All one has to do is to visit schools. The observation of children learning together with different abilities but without the kind of homogeneity that characterizes suburban schools systems is a strong statement in support of the mixture of American society. Alexandria students are learning better today than they did when this city was a segregated school system.[221]

White students themselves have testified eloquently about the value they found at the end of the bus ride. A white high school senior from Charlotte-Mecklenburg reflected, "I've been bused for five years and to be honest with you, I value that experience, my five years of busing, probably more than any of the educational things I've learned. Book learning is also good,

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221/ Wash. Post, March 21, 1982, at D 6, col. 4.

but I've learned to deal, I think, with people."[222] His thoughts were echoed by a white student from St. Louis who acknowledged that his first year in a desegregated high school had brought him disappointment, tension, and loneliness, but who said in his senior year, "I would not take anything for these past three years. I've learned so much. I feel sorry for kids who haven't had the experience I have."[223]

An important part of the job of the public schools is to prepare students to live and work as democratic citizens in a pluralistic society. This preparation includes the basic skills of reading, writing and mathematics, but also requires personal experience with people of different backgrounds. To function effectively in an interracial society one has to have some understanding of what that takes -- a difficult thing to learn in a segregated environment.

Professor Daniel Pollitt of the University of North Carolina Law School summarized students' reactions to the importance of busing in the struggle for interracial understanding in Charlotte-Mecklenburg:

> The typical comment is, they do not remember their plane geometry and they do not remember the poems that they had to memorize but they did have an experience in learning how to adjust to a multiracial society, so that

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[222] "Race Against Time: School Desegregation," aired on Options in Education, May-June, 1980 (Washington, D.C.: produced by J. Merrow in cooperation with National Public Radio and the Institute for Educational Leadership of George Washington University) (a radio program).

[223] Senate Hearings, supra note 1, at 604 (statement of Carolyn Hutto).

> socialization was a very valuable experience.224/

There can be no question that the changes called for by court orders requiring pupil reassignment and busing stimulate apprehension among parents, especially after so many years of racial segregation and complacency. But the overwhelming weight of the evidence establishes that -- contrary to the "findings" of the Helms-Johnston Amendment -- busing has been a generally effective weapon against segregation, has not been the cause of "white flight," is an insignificant expense for most school districts, and has substantial educational and social benefits for black and white students.

IV. IMPLICATIONS OF THE HELMS-JOHNSTON FOR RACIAL HARMONY IN AMERICA

Claims have been made that busing for desegregation has disrupted the racial harmony that once prevailed in the United States. An honest reading of American history suggests otherwise, however. As early as 1846, black parents in Boston eloquently protested the policies of forced school segregation. In a petition to the Boston School Committee on behalf of their children, they said:

224/ Senate Hearings, *supra* note 1, at 262 (statement of Daniel Pollitt).

> [T]he establishment of exclusive schools for our children is a great injury to us, and deprives us of those equal privileges and advantages in the public schools to which we are entitled as citizens. These separate schools cost more and do less for the children than other schools, since all experience teaches that when a small and despised class are shut out from the common benefit of any public institutions of learning and confined to separate schools, few or none interest themselves about the schools -- neglect ensues, abuses creep in, the standard of scholarship degenerates, and the teachers and the scholars are soon considered and of course become an inferior class.
>
> But to say nothing of any other reasons for this change, it is sufficient to say that the establishment of separate schools for our children is believed to be unlawful, and it is felt to be if not in intention, in fact, insulting. If as seems to be admitted, you are violating our rights, we simply ask you to cease doing so.225/

225/ Teele, Evaluating School Busing: Case Study of Boston's Operation Exodus 4 (New York, N.Y.: Praeger, 1973) *citing* "Report to the Primary School Committee, June 15, 1846, on the Petition of Sundry Colored Persons for the Abolition of the Schools for Colored Children with the City Solicitor's Opinion," City Document No. 23 (City of Boston, 1846) [hereinafter cited as the Committee Report], at 2.

The petition was rejected by the Boston School Committee by a vote of three to two. The majority claimed, without apparent basis, that black parents really wanted separate schools for their children. However, the two dissenters, who were forced to publish their views at their own expense, commented scathingly:

> The negro pew, the Jim Crow car, the caste school, unquestionably owe their origin to one and the same cause, and a labored effort to show this cause to be an honest regard for the best intrests of the colored people should meet with tht contempt which is due to gross and deliberate misrepresentation.

Id. at 5, *citing* the Committee Report, at 15.

(Footnote continued)

In Cleveland, Ohio, in the early 1900's, blacks protested racial segregation in housing, and racial discrimination in education and police practices. In the 1920's, blacks in Columbus, Ohio, demanded an end to racial discrimination in housing, employment and education. And in 1943, racial

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Having failed to obtain relief from the School Committee, the black parents group turned to the courts of Massachusetts. Notwithstanding Charles Sumner's impassioned plea that "the exclusion of colored children from the Public Schools . . . [is] a violation of Equality [resulting in] [t]he black and the white [not being] equal before the law," the Supreme Judicial Court of Massachusetts ruled against them. Id. at 6, citing Roberts v. City of Boston [59 Mass. (1 Cush.) 198 (1849).]

Undaunted, these black citizens turned to the Massachusetts legislature, where they met with at least nominal success. In 1855, eight years before the Emancipation Proclamation was issued and thirteen years before the fourteenth amendment to the Constitution was ratified, Massachusetts prohibited discrimination in school assignments "on account of the race, color or religious opinions, of the applicant or scholar." Id., citing "An Act in Amendment of 'An Act Concerning Public School'," [1855 Mass. Acts 256]. Unfortunately, the Boston School Committee was not faithful to this mandate.

Well over 100 years later, in 1972, another group of black parents took the Boston School Committee back to court, this time to a federal court. After two years of vigorous litigation, the United States District Court for Massachusetts found that school authorities had violated the constitutional rights of their black students, as well as state law, by perpetuating a systematic program of segregation affecting not only student assignments, but also teaching and administrative assignments, and the allocation of financial resources. See Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974). One year later, after receiving voluminous evidence on the options for relief, the court ordered the School Committee to implement a mandatory desegregation plan. Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975). And, amid the maximum amount of protest, demonstration, and out-right hooliganism -- much of it encouraged by members of the School Committee -- Boston's unconstitutionally segregated school system finally was dismantled.

discrimination in Detroit, Michigan, gave rise to this country's first major urban riot.

The oppression of black Americans, first through slavery and then through the rule of segregation, has spawned the kind of hate and fear that is not susceptible of easy resolution. However, the United States Supreme Court took a major step forward in 1954 when it decided the Brown case, holding that laws and policies that create or preserve segregated school systems violate the equal protection guarantees of the fourteenth amendment. It is the fundamental principle of equal treatment in public schools that was established in Brown and interpreted in Swann that is imperiled by the Helms-Johnston Amendment. At Senate hearings on court-ordered busing, more than one educational expert testified as did Professor Pollitt of the University of North Carolina Law School that Helms-Johnston "would overturn Swann, and . . . we would go back in time and relive what we went through with some degree of torment."[226]

Moreover, the Amendment would do more than place prospective limitations on desegregation plans requiring busing. Because it contains a retroactive feature, it also would authorize private citizens and the Attorney General to go into federal court and overturn every school desegregation plan that entails busing of more than five miles or 15 minutes in either direction,[227] even if it has been in peaceful and successful operation for more than a decade.[228] One must conclude that the retroactive dissolution of remedies previously ordered and long since implemented would reopen wounds that had healed, and reawaken community and racial conflicts that had been overcome. In fact, for this reason even the Justice Department has stated that it disfavors "blanket retroactive applications,"[229] acknowledging that such procedures would be highly disruptive, akin to "scraping the scab and creating pain anew."[230] However, even if the Department were to put its theoretic position into practice and consistently follow it over time, it would not diminish the threat of a massive retreat from desegregation that would be posed by private individuals who, for whatever reasons, could reopen closed cases and require the federal courts to rescind successful desegregation plans.

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[226] Senate Hearings, supra note 1, at 273 (statement of Daniel Pollitt).

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[227] If the Helms-Johnston Amendment were enacted into law, either the Justice Department or a private complainant could bring an action in federal court to vacate any outstanding desegregation order requiring busing beyond the specific limits established in the law. The district court would be obliged to vacate the order, even if it found that the challenged busing was the only adequate method of rectifying the constitutional wrong. In that case, aggrieved children and their parents would have recourse to the state courts -- which would be unconstrained by the Amendment -- to seek an order reinstating the federal plan, or adopting a similar plan including the busing component.

Whatever decision a state court reached, review ultimately could be sought in the United States Supreme Court. If, as the Justice Department interprets the Amendment, the Supreme Court were not subject to the limitations imposed on lower federal courts, it probably would be free to reinstate the order vacated by the district court, or, in the alternative, to sustain an identical state court order. Indeed, so long as Swann remains the prevailing law, it probably would be obliged to do so. Thus, if plaintiffs had sufficient resources to carry on their fights, the net effect of the law might be limited to requiring communities across the nation to undergo the trauma of reimplementing existing desegregation plans.

[228] Ironically, metropolitan area and county-wide plans, which have proved the most stable and successful, would be hardest hit by the Helms-Johnston Amendment. Moreover, if the total length of the rides they required was in excess of 15 minutes or five miles, they would be dismantled even if the additional busing necessary to achieve desegregation added only one minute or a fraction of a mile to the time required to transport students to the school nearest their homes.

There are at least two very serious implications of establishing such a regressive remedy, and of retreating from the progress that has been made in the last decade. One is the very real prospect of recreating racially segregated school systems;[231] the other, of equally great moment, is the probability that the United States government would be perceived as reneging on its commitment to racial justice.

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[229] Olson, supra note 21, at 3.

[230] 1982 School Desegregation Hearings, supra note 1 (remarks of Assistant Attorney General Olson) (offered in response to inquiry by Representative Kastenmeier) (June 22, 1982).

[231] See, e.g., School Desegregation Hearings, supra note 142, at 324 (testimony of Maxine A. Smith, President, Board of Education, Memphis, Tenn.).

During the floor debate on an earlier "anti-busing" proposal,[232] Representative Glickman of Kansas said, "[T]he implications of this amendment . . . would be catastrophic upheaval to those districts that have complied with school desegregation . . . [and gigantic] emotional upheaval."[233] His sentiments were echoed by Representative Buchanan of Alabama who said, "[I]t would create chaos in school systems throughout the Nation, since virtually every existing situation could be challenged under the new law. The very debate in the legislatures of the 50 States would rekindle old flames of prejudice and racial discord. It would lock in, in too many places, systems of separation and discrimination and lock out, in too many cases disadvantaged children from a hope for quality education."[234]

In connection with the same bill, Representative Drinan of Massachusetts observed, "[M]any districts have been implementing desegregation plans for many years and students both white and minority have developed expectations of where they will be going to school. Friends have been made and school affiliations have arisen. Upon ratification, this amendment would upset countless attendance patterns and numerous expectations of individual students and parents."[235] The bill ultimately was defeated.[236]

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[232] H.R.J. Res. 74, 96th Cong., 1st Sess. (1979) (a constitutional amendment to prohibit school busing) (offered by Representative Ronald M. Mottl (D.-Ohio)).

[233] 125 Cong. Rec. H6448 (daily ed. July 24, 1979) (statement of Representative Dan Glickman (D.-Kans.).

[234] Id. at H6430.

A similar though more dramatic defeat attended an even earlier anti-busing proposal, introduced the year after the Swann decision, and advanced by then President Nixon.[237] Representative William McCulloch of Ohio -- the ranking Republican on the House Judiciary Committee -- introduced the bill, but subsequently repudiated it when a thorough study convinced him that it was unconstitutional and unjust. When then Acting Attorney General Richard Kleindienst came to testify before the House Judiciary Committee in favor of the bill, McCulloch declared:

> It is with the deepest regret that I sit here today to listen to a spokesman for a Republican Administration asking the Congress to prostitute the courts by obligating them to suspend the equal protection clause [of the Constitution] so that Congress may debate the merits of further slowing down and perhaps

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[235] Id. at H6444 (statement of Representative Robert Drinan (D.-Mass.).

[236] Indeed, many Southern members whose districts had been directly affected by desegregation orders were vocally opposed to it. For example, Representative Bill Alexander of Arkansas spoke for many Southerners when he said, "[T]he question of busing has been resolved. I can see no value in resurrecting this issue. To continue this debate would cause more division . . . ." 125 Cong. Rec. H6447 (daily ed. July 24, 1979). Moreover, the North Carolina delegation, which, it may be recalled, represented the state in which the Swann case arose, voted 6 to 5 against it. School Desegregation Hearings, supra note 142, at 68.

[237] See, H..R. 13916, 92d Cong., 2d Sess., 118 Cong.Rec. 9012 (1972).

> even rolling back desegregation in public schools.[238]

He asked the witness: "What message are we sending to our black people? Is this any way to govern a country? Is this any way to bring peace to a troubled land?"[239]

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[238] *School Busing (Part 2): Hearings on H.R. 13916 Before Subcomm. No. 5 of the House Judiciary Comm.*, 92d Cong., 2d Sess. 1138 (1972) (remarks by Representative William McCulloch.

[239] *Id.*

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